MISSISSIPPI LAW JOURNAL

THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: REFLECTING ON 150 YEARS

The Ole Miss Law School 1939-1942
Robert C. Cannada
Comments from a Former Dean
Parham Williams
Law School Recollections 1953-1955
Lenore L. Prather
Reflections—My Experience at the University of Mississippi Law School
Reuben V. Anderson
Law School Reflections
Constance Iona Slaughter-Harvey
Becoming a Citizen
John Taylor Moses

ARTICLES

Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing
Mark Osler
Separation of Powers at the State Level, Part II: Service in A Civilian Public Office and in the National Guard
Judge Leslie H. Southwick
Lesser Included Offenses in Mississippi
Michael H. Hoffheimer

COMMENT

Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis

RECENT DECISION

Constitutional Law—Eleventh Amendment—Abrogation of States' Sovereign Immunity in Title II of the Americans with Disabilities Act Held a Valid Exercise of Congress's Fourteenth Amendment Section Five Power

VOLUME 74 **FALL 2004** **NUMBER 1**

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THE MISSISSIPPI COURT OF APPEALS

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THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: REFLECTING ON 150 YEARS

In commemoration of the sesquicentennial of the University of Mississippi School of Law, the *Mississippi Law Journal* has invited graduates from the last sixty years to reflect on their experiences while in law school. We hope that these essays will serve as a reminder of how much the School of Law has evolved during this time and provide insight into where it is headed in its next 150 years.

Darrell C. Tucker, II
2004-2005 Editor-in-Chief

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THE OLE MISS LAW SCHOOL 1939–1942

Robert H. Cannada[*]

In September of 1939, I arrived on the campus of the University of Mississippi. This was the first time for me to view the campus. I was born and raised in the small town of Edwards, Mississippi, located halfway between Jackson and Vicksburg. The population of the town was approximately 1000 and my father was primarily a farmer raising cotton, soy beans, and cattle. I attended the public schools in the town of Edwards; however, the decision was made to send all twelfth grade students (there were twelve of us) to the high school department of Hinds Junior College located about ten miles from Edwards in the town of Raymond. I then attended two years at Hinds Junior College and was accepted into the Ole Miss Law School. I was nineteen years old on July 29 of that year. My parents had taken me to the city of Jackson and had loaded me and my trunk on a Trailways bus which I rode to the town of Oxford. I knew very few people on the campus; however, I soon found that there were many from small towns who, like me, had never visited the campus. The student body was approximately 1000. The "motto" seemed to be "everybody speaks"; so I soon began speaking to every other student as we passed each other.

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[*] Robert C. Cannada has spent some fifty years as a practicing attorney. He is now of counsel with the law firm of Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Mississippi, was one of its founders, and served as its managing partner for over twenty-five years. The law firm is the largest Mississippi–based law firm, consisting of over 150 lawyers.

He was one of the founders of the Reformed Theological Seminary which has campuses in Jackson, Mississippi, Orlando, Florida and Charlotte, North Carolina, together with extension locations in the United States and overseas. He served as Chairman of its Board of Trustees and of its Executive Committee for over twenty-five years.

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sippi. Accordingly, we could, with a clear conscience and without any real "intimidation," proceed with our studies in the way and manner we thought best for us. Many close relationships were developed with members of the faculty; and I found that, without exception, the members of the faculty were ready, willing and anxious to discuss with us privately or with a group any questions that we had pertaining to their classes. I thoroughly enjoyed the last two and a half years of law school. The threat of war prevailed and none of us knew that we would be able to finish law school before "going to war." Many in the class elected to leave law school and apply for an officer's commission in the armed services rather than wait and be drafted. After Pearl Harbor, December 7, 1941, since I had already registered in the draft and was subject to call, I determined to volunteer for some branch of the service. Accordingly, I volunteered and was accepted into the Naval Air Corps. The recruiting officer suggested, however, that I also volunteer for line officer duty in the Navy if I really desired an early call to duty—so I did that. By graduation in May 1942 there were not very many in my class left in the law school.

I have many fond memories of my law school days. For instance, insofar as I know, we had the first female law school student. Her name was Walterrene Price. There was a rather famous men's clothing store that advertised that all of its suits were the same price and had become known as the "one price only" store. We affectionately called our one female student "One Price Only" or O.P.O. She readily accepted that name and was one of the favorites in our class.

While there was no official "uniform" or "dress of the day" for law students, we were reminded quite forcefully by the dean that we were to look the part as well as act the part of future lawyers. Accordingly, when one of the students showed up in class one day wearing golf knickers, the dean remarked at a meeting of the student body that as the length of our trousers grew shorter our grades would go downward. I do not remember this student ever coming to school in knickers again.

The honor system was in effect and we were expected to type out our answers to all tests and exams. We were not expected to look at any of our notes or any books nor were we permitted to leave the building. The answers were to be turned in before we left the building. I personally know of no one who violated this honor system. In fact, I know of no one who even tried to get help from another student.

In preparing for our classes in "Contracts" we were normally assigned cases to read and analyze before going to class. We were expected to make notes on those cases and be able to explain the case before the class. My contracts teacher was a professor named John Fox and he had a way of "intimidating" members of the class even though we all loved and adored him. I had quite an experience with Professor Fox in one of our first classes. In his lecture pertaining to the drawing of a contract he had expressed the impossibility of adequately expressing our intentions in words. I am not sure whether he asked me or whether I volunteered. Nevertheless, I was called upon to give a word description of something that could not be misunderstood. I thought for a moment and gave the illustration of a "crossroads". He asked me what I meant and I said it is an area where the roads cross. This gave him the opportunity he was seeking. He went to the blackboard and drew two parallel lines north and south representing one road and then two parallel lines east and west representing the other road. He said, "Now, where is the crossroads?" I made a mistake. I told him the area where the roads crossed. He then erased everything but the square space left where the roads crossed and wanted me to then identify that as a crossroads. It was obvious that I should have identified the crossroads as two "roads" that cross and not limited my definition to the exact area where they cross. This is the type of intimidation that Professor Fox thoroughly enjoyed and, as the year progressed, I enjoyed the challenge.

My affection for the law school, the faculty, and fellow students grew during the entire time that I was privileged to attend the law school. I think my experience was typical of most of us in the school. There had been well over a hundred of us in the entering class and by the time of our graduation, the number had shrunk considerably. Before we graduated, we received messages of the military deaths of several of our classmates including my "bull–rat" close friend. They gave their lives in the cause of preserving liberty and the unchangeable moral rule of law concept that are a precious part of our heritage.

This leads me to the governmental philosophy concept of our government that I have been given permission to discuss in this paper. I believe this concept is basic and fundamental and should be considered by every law school and every lawyer in our nation.

The vote for independence from England was carried on July 2, 1776. Two days later, the delegates from the Colonies approved the Declaration of Independence. That document, the Declaration, created a new entity. That entity was named the United States of America. The Declaration, in effect, constitutes the charter of this new entity—the United States of America. In the Declaration the purpose of all governments is identified and set forth. That purpose is to secure the unalienable rights with which all people are endowed by their Creator.

The Government of the United States of America is organized by the Constitution. This document, the Constitution, is, in effect, the bylaws of the entity. The Constitution provides the authority and the procedure to be followed by the officeholders in the government of the United States of America as they "secure" the unalienable rights with which its inhabitants have been endowed by the Creator.

The United States of America, cannot survive if the Constitution is separated from its foundation, the Declaration, just as a corporation cannot survive without a charter or a building cannot survive without a foundation. The charter brings a civil entity into existence and sets forth the purpose for the entity. The bylaws set forth the way and manner in which that purpose is to be accomplished. The Declaration and the Constitution are not to be separated. An oath to support the Constitution is an oath to support the purpose of the government as set forth in the Declaration, which purpose is to secure the unalienable rights with which all people are endowed by their Creator.

The Constitution provides that: "The Senators and Representatives of the United States of America and all members of the several state legislatures and all executive and judicial officers under both the United States and the several states *shall be bound* by Oath or Affirmation to support this Constitution, ..." (Emphasis added)

The governmental philosophy or the "Rule of Law" concept to which the government of the United States of America is subject (and this includes the members of the Supreme Court) is, it seems to me, found in the Declaration and the Constitution. Every officeholder in the government is bound by an oath or an affirmation to support *this* philosophy of government or "Rule of Law" concept. Human reasoning, including the reasoning of the members of the Supreme Court, can *only* be used to interpret that philosophy of government or "Rule of Law" concept. The members of the Supreme Court do not constitute an oligarchy authorized to ignore the Declaration and the Constitution and change the philosophy of the government and the "Rule of Law" concept to which the government is subject. The members of our Supreme Court are a part of that government and are not authorized nor are they empowered to declare that the philosophy of that government—its "Rule of Law" concept—is atheistic or pagan and completely ignore the Declaration and the Constitution in which the philosophy of the government of the United States of America or "Rule of Law" concept is set forth as theistic.

I believe that every law school and every lawyer in this nation should consider the following questions. Do the documents that created our nation and its government, the Declaration and the Constitution, establish a governmental philosophy or "Rule of Law" concept which is to be recognized and honored by the officeholders in the government? If those documents do establish a governmental philosophy, then is the concept of that governmental philosophy atheistic or theistic? I believe those documents clearly and without question set forth a governmental philosophy or "Rule of Law" concept that is theistic—that the government is to recognize and honor the laws of Nature and the laws of Nature's God—the God of Creation—the Creator.

The governmental philosophy or "Rule of Law" concept as set forth in the Declaration and the Constitution recognizes the existence of the laws of Nature, the laws of Nature's God, the Creator, the Supreme Judge of the World, divine Providence, and truths that are self–evident. Those founding documents clearly set forth a theistic governmental philosophy that is to be recognized and honored by the officeholders in the government. Any decision by the any branch of the government is subject to the governmental philosophy or the "Rule of Law" concept as represented by the Laws of Nature, the Laws of Nature's God, the self–evident truths and other provisions set forth in the Declaration and the Constitution. The members of the Supreme Court may interpret the principles of that governmental philosophy and "Rule of Law" concept, however, they are not authorized to ignore those documents and then set forth a different governmental philosophy or "Rule of Law" concept that is contrary to or in conflict with the unchanging and unchangeable "Rule of Law" concept that is set forth in the Declaration and Constitution.

The "Rule of Law" insofar as the government of the United States of America is concerned is to be drawn from the laws of Nature, the laws of Nature's God and the truths that are self–evident as referred to in the Declaration. All decisions of the Supreme Court are subject to that "Rule of Law" drawn from the laws of Nature and of Nature's God along with the self–evident truths referred to in the Declaration. This "Rule of Law" contains the moral standards—the morality—that the government is challenged to maintain in our society. This "Rule of Law" presupposes the existence of a Creator God. It is based on a theistic governmental philosophy as distinguished from a government with an atheistic or pagan governmental philosophy.

In America, under its theistic governmental philosophy and "Rule of Law" concept, some actions are "right" and some actions are "wrong." Every officeholder in our government takes an oath or affirmation to acknowledge and honor this fact. Insofar as our government is concerned, there are "truths" that are self–evident and unchangeable. These moral "truths" have been established by the Creator—they are self–evident. These "truths" may be religious in nature but they are not drawn from any particular religion and are to be recognized and honored by our government. The members of the government of the United States of America, including the members of the Supreme Court, took an oath to do just that. *They should respect their oath.* No religion is involved.

The Declaration provides that all people are endowed by their Creator with certain unalienable rights. No civil government, a government made up of people, has the power to vest in people rights that are unalienable. This can only be done by a Power that is higher than a government made up of people. Thus the Supreme Court *cannot* recognize that the people of America are vested with rights that are "unalienable" unless the members of the Supreme Court are prepared to recognize and honor the existence of a Creator as set forth in the Declaration. The existence of a Creator is a fact which the members of the Supreme Court actually acknowledged when they took the oath or gave the affirmation required of them to become a member of the Supreme Court.

In fact, if a "Rule of Law" is only the product of human reasoning then all is relative—there is no "right" or "wrong"; indeed, there is no "Rule of Law."

In addition, if the "law" as determined by the Supreme Court is not subject to the "Rule of Law" concept which is drawn from the Organic Laws of our nation which Organic Laws are set forth in the United States Code, then there can be no such thing as unalienable rights in the people. A government made up of people simply does not have the power to vest the people with unalienable rights.

The basic question, then, that all law schools should consider is whether the officeholders in our government are to recognize and honor a changeable "law" concept drawn from "tradition or history" (human reasoning) as the governmental philosophy or “Rule of Law” concept on which the government of our nation is based (a government with an atheistic philosophy) *or* whether the officeholders in our government are to recognize and honor the unchangeable governmental philosophy or “Rule of Law” concept drawn from the Organic Laws of the government of our nation—the Declaration and the Constitution—(a government with a theistic philosophy).

COMMENTS FROM A FORMER DEAN

Parham Williams[*]

I became a part of the Ole Miss Law School in the fall of 1952 when I first enrolled as a fortunate beneficiary of the now defunct "3-2 Program." Structured to expedite the legal education of returning veterans, the program permitted an Ole Miss student, after completing the junior year, to enter law school and graduate two years later with both an undergraduate and law degree. Although some may argue that both the undergraduate and law experiences were shortchanged, more than 500 lawyers, most of whom have enjoyed successful careers, earned their degrees through the program.

The Ole Miss Law School of 1952 was small by present standards (eight faculty members and approximately ninety students), but it possessed surprising academic strength. The Contracts, Bills and Notes, and Evidence courses taught by John Fox (the Great White Father) were as rigorous and challenging as any course I later had at Yale. Property under Roscoe Cross and Creditors' Rights under Hector Currie (Rhodes Scholars both) were demanding intellectual experiences. And for sheer delight, any course taught by Dean Bob Farley was unforgettable.

In form and tradition, in the inherent gentilesse of its faculty, in the familial relationships of its students, the law school of the 1950's was but another incarnation of the institution presided over by its "founding fathers," William Forbes Stearns and L.Q.C. Lamar. Stearns, the first Professor of Law, was largely self-educated, a man whom Chancellor Barnard regarded as "the best-read man" he had met in the South. It was he who organized the initial curriculum, gave the lectures for every class, served as law librarian and, through his eloquent circular letters to the bar, enlisted state-wide support for the nascent law school. In an age of superb orators, Stearns was among the most brilliant. Thus, it was no surprise that this twenty-eight year old attorney was chosen to deliver the oration at the public ceremony accompanying the laying of the cornerstone of the Lyceum on July 14, 1846.[1]

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[*] Vice President and Dean of the Chapman University School of Law. University of Mississippi B.A., LL.B., University of Mississippi; LL.M., Yale University. Served as professor of law at the University of Mississippi School of Law for twenty-two years, during which time he served as dean of the law school for fourteen years. For eleven years after leaving Mississippi, served as professor of law and dean of the Cumberland School of Law at Samford University.

Following the Civil War, the school was revived under the leadership of its most illustrious leader, L.Q.C. Lamar. Although Lamar served only three years as Professor of Law, his tenure was marked by enlightened innovation. It was he who inaugurated the case method of law study—a decade before Langdell at Harvard—and who developed and presided over the first moot courts.

A century later, the Law School was led by a man who was cut from the same cloth as Stearns and Lamar. Dean Robert J. Farley was a man of impeccable character, unyielding courage and the enviable talents of a master raconteur. My generation of law students was privileged to have had Dean Bob Farley, one of the true gentlemen of our profession, as our mentor and role model. He and his colleagues formed an inspiring, challenging, and thoroughly enjoyable group of teachers.

When I returned to the law school as a neophyte teacher in 1963 (after a few years of practice and two terms as a District Attorney), I had the rare privilege of continuing to learn from these great teachers. The law school of the early 1960's had a few more students but the same number of faculty as a decade earlier. Happily, the school now boasted a modern annex that doubled the size of the original Lamar Hall. Significant changes, however, were occurring in the faculty. Bob Farley, wearied by the incessant sniping of die hard segregationists, would soon depart for a distinguished position at the University of Florida Law School. Hector Currie would leave to join the LSU Law School faculty. Gone too were Harold Wren and Bill Murphy, with Roscoe Cross soon to follow. The core of the remaining faculty consisted of Bill Bunkley, Art Custy and the redoubtable Great White Father. Sadly, John Fox would die in 1965, a victim of leukemia.

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[1] DAVID G. SANSING, THE UNIVERSITY OF MISSISSIPPI: A SESQUICENTENNIAL HISTORY, 42 (1999).

The ensuing seven years provided a rich educational experience for one who would be a law school dean. Quickly getting my feet wet in law school administration, I early on had the opportunity to serve as Assistant Dean under Josh Morse. These were challenging times, and the nature of the Law School, indeed of the University, was changing rapidly. Determined to broaden the school's influence and stature on a national scale, Josh introduced exciting and sometimes controversial innovations. Dynamic young faculty members were attracted to Ole Miss, and significant grant money was soon to follow. The Ford Foundation provided a multi-year grant exceeding a million dollars to bolster faculty salaries and support minority students with scholarships and stipends. The National Defender Project provided a grant to support law student interns who were assigned to assist lawyers representing indigent clients. The U.S. Office of Economic Opportunity supplied major funding to establish and operate a legal services program involving law faculty and students. The resulting program, the North Mississippi Rural Legal Services, continues to render useful service today.

In 1969, Josh accepted the offer to become dean of the Florida State University Law School, and Bill Bunkley was chosen to succeed him at Ole Miss. Again, I was fortunate. Bill asked me to serve as his Associate Dean, a position in which I continued to acquire invaluable experience in the many areas of law school governance. Warmly personable, highly intelligent and a wonderful human being, Bill was denied the opportunity to fully develop his plans for the Law School. In September, 1971, he fell victim to a massive heart attack. Following his untimely death, Chancellor Porter L. Fortune, Jr. recommended to the Board of Trustees that I be named dean. On October 22, 1971, the Board unanimously approved his recommendation.

Once again, I was fortunate. I inherited a faculty that was intellectually strong, respected by the profession, and highly motivated to teach effectively and usefully. The principal University administrators, Chancellor Fortune and Vice Chancellor Alton Bryant, were supportive of the Law School and determined that it would receive a fair shake in the allocation of operating funds. On the state level, the Legislature and the Building Commission were peopled with influential friends of the Law School and University. Importantly, the legal profession in Mississippi, which consisted largely of Ole Miss graduates, was strongly supportive and loyal. I also was fortunate that Bill Champion agreed to serve as Associate Dean, for he brought to the task a calm wisdom that soothed the occasionally troubled academic waters. In short, the elements were in place with which to launch a time of significant growth and development for the Law School. But first, it was a time for the setting of goals.

Priority number one was the construction of a modern, efficiently designed building to house the rapidly growing law enrollment and programming. The then Lamar Hall, built in 1931 and adequate for that time, was woefully inadequate for the burgeoning law school of the 1970's. Accordingly, we began preliminary planning for the construction of the fourth building[2] to house the law school. After memorable lobbying efforts with the Governor, Legislature and Building Commission, the sum of $4.3 million was appropriated for the new building and construction begun. In 1978, the Law School moved into the present Lamar Hall.

A second, and critically important goal, was the development of multiple sources of private funding to supplement declining Legislative appropriations.[3] Blessed with a commodious new building, excellent students, and a faculty that was gaining national recognition for its scholarship, the Law School was poised to become an influential institution in American legal education. Without significant private funding, however, the school would be hard pressed to achieve the desired success. Accordingly, we determined to develop endowments to support three key areas: law scholarships; faculty chairs; and lectureships. Careful planning and the hard work of a great many people culminated in the successful funding of the Senator James O. Eastland Scholarship Endowment in 1978. The first significant endowment for the Law School, the Eastland Scholarships have enabled the school to attract and support dozens of outstanding law students.

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[2] The pre-Civil War law school was located in rented quarters on the Oxford square. Later, the school was housed in a corner of the Lyceum. When a new library was opened in 1911 (the present Bryant Hall), the law school moved into the vacated former library building (the present Ventress Hall) where it remained until 1931.

To facilitate the bringing of respected lecturers to the campus, we focused efforts on developing endowed lectureships. These efforts led to the establishment of the Justice William N. Ethridge Lectures in 1975, the Judge Burnita Shelton Matthews Lectures in 1976, and the James McClure Lectures in 1979. Succeeding years have seen the institution of additional important lecture series whose purpose is to enrich the academic experience of law students.

In 1984, a campaign was launched to develop funding for the Congressman Jamie L. Whitten Chair of Law and Government. The effort successfully concluded two years later with the funding of the Law School's first endowed chair.

The establishment of the Lamar Order in the early 1980's marked the real beginning of significant private support for the Law School. Designed to provide a consistent flow of funds usable for lectureships, scholarships and other forms of academic enrichment, the Order has been an invaluable source of support. Today, more than 865 alumni and friends of the Law School are members of the Order. Their annual gifts enable the School to achieve that enviable margin of excellence that distinguishes the Ole Miss Law School from so many others.

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[3] By the 2004-2005 academic year, legislative funding provided less than twenty-five percent of the University's operating budget. The remainder came from student tuition, private gifts and income from endowments.

A law school must be more than an academy in which the theory of law is disseminated. In urging the Legislature to establish a law school at the new University of Mississippi in 1854, Jacob Thompson called for a law program that would encompass not only law instruction but the "science of government" as well.[4] Mindful of this responsibility, we posited as another goal the establishment of service programs that would materially benefit various elements of the legal profession and governmental entities within the state judicial system. Strongly supported by alumni in the Legislature and judiciary, the Law School successfully established the Mississippi Judicial College, the Mississippi Prosecutors College, the Court Reporting Program and the Mississippi Law Research Institute. In succeeding decades, each of these programs has provided invaluable support to state government and has served to relate the Law School more closely to the legal profession.

Building construction and fund raising were by no means the most important accomplishments during the decades of the 1960's, 1970's and 1980's, for these years saw a consistent improvement in the academic credentials of incoming students and a steady strengthening of an already competent faculty. Importantly, these years witnessed a continuing affirmation of the fact that an Ole Miss legal education would be available to any academically qualified person regardless of race, creed or gender. Students of color formed an essential part of the student body, and upon graduation, found positions of influence in law firms and governmental agencies. Tyree Irving, for example, became the first African-American judicial law clerk for a Justice of the Mississippi Supreme Court, and Rueben Anderson became the first person of color to serve as a justice of that Court. A.C. Wharton, now the Mayor of Shelby County, Tennessee, was the first person of color to teach as an adjunct professor at the Ole Miss Law School. The late Lewis Westerfield became the first full-time African-American law professor at the School, and later was named its first African-American dean.

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[4] *See* SANSING, *supra* note 1, at 69.

Since its founding in 1854, the Law School has demonstrated enviable proficiency in fulfilling its responsibility to teach the "science of government." Its graduates have dominated the judiciary, both state and federal, in Mississippi, and a healthy proportion of our governors, legislators, congressmen and senators have Ole Miss Law School diplomas hanging on their office walls. The Law School experience is also a valuable training ground for academia, as attested by the present Chancellor of the University, Robert C. Khayat, class of 1966, and the three graduates who currently are law school deans.[5] And of course, if one wishes to become an internationally acclaimed novelist,[6] what better preparation than an Ole Miss Law degree?

It cannot be said honestly that the history of the Ole Miss Law School, from its founding to the present, has been a steady progression toward excellence. True, the initial years held the bright promise of eventual national prominence. Professor Stearns and Chancellor Barnard[7] had a broad vision of both the University and its law school, but the vicissitudes of the Civil War rendered that vision little more than a dream. There was a brief renascence under Lamar's leadership, but then the school lapsed into almost a century of neglect, underfunding and leadership of limited vision. The post-World War II years, however, have witnessed a rebirth of that early vision. Favored with the support of loyal alumni, with energetic leadership, with increasing financial support from private and governmental sources, and with an active, nationally respected faculty, the Law School of today is an excellent institution, one that is respected and influential in American legal education. Truly, the past fifty years have been golden years for the Ole Miss Law School.

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[5] Samuel M. Davis, class of 1969, is Dean and Director of the University of Mississippi Law Center; Frederick G. Slabach, class of 1982, is Dean of the Texas Wesleyan University School of Law; and Parham H. Williams, Jr., class of 1954, is Vice President and Dean of the Chapman University School of Law. Additionally, Joshua M. Morse III, class of 1948, is the former dean of the University of Mississippi and Florida State University law schools.

[6] John Grisham, class of 1981.

[7] Frederick A.P. Barnard was Chancellor of the University of Mississippi from 1856 until 1861. He later became president of Columbia University. Barnard College of that university bears his name.

Are there visible currents that have hastened this metamorphosis? What are the discernible trends in the history of the School over these last fifty years? There are many, but I will suggest only four.

The first is a very visible one: the advent of women into legal education and the legal profession. When I entered law school in 1952, there were two, yes, just two, female law students. The decade of the 1970's, however, witnessed an explosion in the number of women seeking law degrees. Today, women constitute approximately one-half the law student enrollment nation-wide; in many law schools they are the majority. The effect on the legal education process has been salutary. Women are the intellectual equals—and often the superiors—of male students, and very often are more motivated to succeed, perhaps because they have overcome more obstacles to reach law school. Their presence in the student population has led not only to substantial increases in enrollments but also to significant strengthening of the legal academic environment.

The second trend is also highly visible: the increasing presence of racial minorities in the law school population. It was not until the mid-1960's that people of color were admitted to the Ole Miss Law School. The graduation of the first African-American law students in 1967 was an epochal moment in the history of the University and, indeed, of Mississippi. Today, people of color are an integral and very important part of the law school enrollment and of the legal profession.

A third trend, though less evident, has been influential in shaping the law school of the Twenty-First Century. Fifty years ago, only a handful of law schools intensively screened applicants for admission. Many schools operated under the "admit 'em, then flunk 'em out" principle, and deans were infamous for telling entering classes to "look to your right, then look to your left. By the end of this academic year, one of the three of you will not be here!" In the late 1960's, however, rapidly increasing numbers of applicants compelled law school admission committees to review application files more closely and to reject those applicants who clearly had no hope of succeeding academically. About the same time, the advent of the Law School Admission Test provided a standardized system for evaluating the potential of candidates. Today, the admission process is highly selective, with most schools admitting only those persons who, in the opinion of the faculty admissions committee, clearly have the potential to succeed in law school. The effect has been dramatic. Driven by intelligent, motivated students, the teaching process in today's law school is more exciting and (hopefully) more effective than in the classrooms of fifty years ago.

I suggest that a fourth important trend has been the development of clinical opportunities in legal education. Even before the McCrate Report[8] focused interest on practice-oriented law training, law schools had begun offering clinical experiences in which the law student, after completing the requisite classroom courses, was permitted to counsel actual clients under the supervision of a qualified attorney. Today, all law schools offer a range of clinical courses designed to provide "hands-on" training to supplement the theoretical experience of the classroom. The Ole Miss Law School is a leader in this important field, currently offering the Prosecutorial Internship Program, the Public Service Extern Program, and the Civil Legal Clinic in which students may opt to specialize in Consumer Law, Family Law, Elder Law, Juvenile Advocacy, Street Law, or Legislation. The impact of practice-oriented training on legal education has been enormously beneficial. Students graduate with a much better understanding of the practical aspects of the law. Better trained lawyers make for a more efficient legal system. Equally important, however, is the sensitization of students to the endemic problems of our society. Lawyers who are aware of injustice are more inclined—and better equipped—to render useful service to their clients and to the cause of justice.

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[8] The report prepared by the American Bar Association's Task Force on Law Schools and the Profession, issued in 1992. The Task Force was chaired by Honorable Robert McCrate.

Will these and other currents continue to shape and mold the Ole Miss Law School of the future? Without doubt, the answer is "yes!" The role of women in the legal profession will continue to increase during the next fifty years. The proportion of women students in law enrollments undoubtedly will continue to grow, and the proportion of women in the profession generally will rise to reflect the law school experience. The trend will be visible in academia as well. Today, of the one hundred eighty-seven deans of American Bar Association-accredited law schools, thirty are women, including the deans of such prestigious law schools as Harvard, Duke and Georgetown. By 2050, I have no doubt that women deans and law professors will equal or outnumber their male colleagues.

Minority representation in law enrollments and in the profession will grow also, perhaps with greater emphasis on Asian-Americans and Hispanics. Similarly, clinical education programs will continue to be an integral part of legal education. The value of such training will continue to be demonstrated in future generations of young lawyers.

One additional trend is worthy of comment. The advent of internet communications has opened wide vistas for innovative teaching. Several law schools have experimented with distance learning techniques with varying success. A new concept in legal education is embodied in the Concord Law School, an online law school that offers a complete law curriculum via the internet. Will the Ole Miss Law School offer a similar curriculum? It's best to hedge one's bet at this point. There are too many imponderables in the mix. For example, will state bar examiners accord recognition to a degree earned online with no classroom component? How will an online law program provide effective clinical training? Clearly, it's too early to suggest that the entire academic program of the Ole Miss Law School will be accessed remotely, with grades given and degrees awarded. I do suggest, however, that most law schools, Ole Miss among them, will begin to offer selected courses online during the next decade.

The past fifty years have indeed been good ones for the Ole Miss Law School. From the small, somewhat parochial institution of the 1950's, the school has metamorphosed into a modern institution that commands respect and exercises influence on a national stage. Importantly, the Law School remains faithful to its original mission: the training of young men and women for effective, useful careers in the legal profession and in public service. And the good news is: the best years of the Ole Miss Law School are in the future!

LAW SCHOOL RECOLLECTIONS 1953-1955

Lenore L. Prather[*]

The University of Mississippi School of Law celebrated its centenary in 1954 while I was a law student there. It was appropriate to acknowledge that milestone in its history with events including an address by United States Supreme Court Justice Felix Frankfurter. Fifty years later, we must acknowledge another benchmark.

My memory vividly recalls being a student at a unique time when the Law School was educating veterans of World War II and Korea. Dean Robert J. Farley described the years of World War II as difficult ones because students and faculty were being called into military service.[1] When World War II ended, federal legislation was enacted to expedite the education of returning veterans and this practice continued during the subsequent Korean War of 1950-1953.[2]

To comply with the Acts of Congress regarding veterans who wanted to complete their education after military service, and also to afford an accelerated schedule to a law student who wanted to complete his undergraduate and law studies before having to comply with the congressionally mandated military service of that day, the University instituted the Accelerated Wartime Program.[3]

Traditionally, the law school required three full years with two semesters per year to complete the required hours for a LL.B. degree. To implement the new federal law, the faculty added a 16 week course in the summer for a third semester within a year permitting a student to graduate in two full years. This accelerated schedule required that classes meet six days a week.[4]

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[*] Former city judge for the City of West Point, Mississippi; served as Chancellor for the Fourteenth Chancery Court District for twelve years; served on the Mississippi Supreme Court for eighteen years, during which time she was chief justice for four years.

[1] Robert J. Farley, *The School of Law—The First Hundred Years*, 25 MISS. L.J. 87, 88 (1954).

[2] At least one of our class members, Omar Craig, served in both wars.

[3] Catalogue, University of Mississippi (March 1945).

One of our classmates, Mary Libby Bickerstaff Payne (who attended Mississippi State College for Women for two years and then transferred to Ole Miss in her junior year) received credit toward both her undergraduate and as well her law degree for her third year of undergraduate work. She then entered law school at Ole Miss in her fourth and fifth years of college work and received her undergraduate and her law degree from Ole Miss within five years. I suggest that this was also a part of the Accelerated Wartime Program, but I cannot verify that assumption.

Thus my tenure at the Law School as a student began in September, 1953 and I graduated in August of 1955. During this time period, the student body was composed of many World War II and Korean War veterans. In addition three female students were enrolled which at that time was the largest class of females to that date. Perhaps our three female law students of that day were an encouragement for the large number of females enrolled in law school today, which is approximately one-half.

One might say that the law students of my era were non-traditional for that time period. Certainly, the veterans were older and more mature, and many were married. The three female students in our entering class were Mary Libby Bickerstaff and Dorothy Clower of Gulfport, Mississippi, and I was from West Point, Mississippi. We did not regularly use the study rooms in the basement of Farley Hall where law classes were taught and the law library was located. I preferred the quiet of my graduate dorm room in Ricks Hall, the female graduate dorm. So the law library or the dorm was typical study hall of the female students.

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[4] I recall one Thanksgiving spent on campus because we had Saturday morning classes before the Mississippi State v. Ole Miss football game! But the biggest football game for law students was the male law students versus the male medical students. That rivalry became history when the medical school was moved to Jackson.

I am often asked about the acceptance of women in the classroom in that era, and I always replied that we received the same acceptance and questioning as the men. One professor, John H. Fox, Jr., who taught three required courses, (Contracts, Bills and Notes and Evidence) always caused an apprehension for me, but I enjoyed his instruction to the fullest extent. He was affectionately called the Great White Father of the Law School with his imposing stature, his solid white hair and commanding presence. I especially remember his lecturing in Contracts class about the first contract ever made. To my amazement, my fellow classmate, Mary Libby Bickerstaff, took issue with Professor Fox and stated that the first contract was God's promise found in the Bible to His believers. She argued with authority and conviction AND she passed Contracts and was top student in our August graduating class.

Professor Fox was only one of many excellent professors. I loved to hear Professor Hector Currie excitedly talk about Blackacre in Real Property; Professor William P. Murphy overwhelmed us in Constitution Law; Dean Robert Farley taught Torts; Professor Joel Bunkley provided directions in Civil Procedure; Ms. Corinne Bass, Librarian, taught us how to use those law books in Bibliography and Arthur Custy tried to teach me Oil and Gas law. Many other practicing attorneys added practical experience to our studies, which was of great benefit. The one that made a particular impression on me was Mr. Lester Sumners, Sr. of New Albany. Mr. Sumners taught Chancery Practice, a course that was a wonderful foundation for the bulk of my practice and subsequent tenure on the bench of both the Chancery Court and the Mississippi Supreme Court.

The *Mississippi Law Journal* provided the scholarly articles that continues today for students. I recall that during that period Cary Bufkin, Bell Beck, Hunter Gholson, and Harry Griffith were selected to be editors. The landmark decision of *Brown v. Board of Education* was the subject of discussion in the classroom and in the *Journal.*

One might ask if this accelerated wartime program achieved its goal and also provided solid instruction, and my answer would be that it accomplished its purpose with good results. From this group of my era, there were two among us that became founding deans of law schools, Parham H. Williams at Cumberland University in Birmingham, Alabama, and Mary Libby Payne at Mississippi College School of Law in Jackson. Parham Williams was also the Dean of the Ole Miss Law School as well. At least twelve served in judicial posts, but all were good and learned lawyers who served their clients. All of our class had success more than we deserved and for which we will ever be grateful to the Ole Miss Law School for the outstanding educational opportunity.

REFLECTIONS—MY EXPERIENCE AT THE UNIVERSITY OF MISSISSIPPI LAW SCHOOL

Reuben V. Anderson[*]

It is an honor for me to provide a few reflections in commemoration of the 150th anniversary of the University of Mississippi Law School. I have many memories of my time as a law student at Ole Miss. I am happy to be a part of the transformation of the institution into what it is today.

It is hard to believe that it has been almost forty years since I enrolled at the University of Mississippi Law School, in the fall of 1965. I remember it clearly, for it was a very troubling, yet rewarding time for me. In those days, Mississippi was fraught with oppression and segregation. As the country moved towards integration, African-Americans in Mississippi fervently pursued their civil rights while most of white Mississippi resisted with passion, economic sanction and violence.

Although I grew up in Mississippi during the 40s and 50s when the state adhered to the mantra of Dred Scott, that a black man had no rights that a white man need respect, I was quite fortunate. As an adolescent, the father of my closest friend was an attorney. In fact, his father, Jack Young, Sr., was one of only five African-American attorneys in the state of Mississippi. I spent an extraordinary amount of time at the Young household. Consequently, I saw the manner in which Mr. Young worked as an attorney with many prominent figures in the fight for equality, such as Thurgood Marshall, Roy

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Wilkins, head of the NAACP, and Medger Evers. It was during this time that I developed an interest in becoming a civil rights attorney.

I enrolled at Tougaloo College in 1960. Tougaloo was a hot bed of civil rights activity at that time and throughout the 60s. The first sit-ins at the Jackson Library and the Jackson Zoo were staged by mainly Tougaloo students and it was to become a staging ground for Freedom Riders, voter registration workers and others who came to the state to assist the African American community in its struggle against racial oppression.

African-Americans desperately employed strategies such as civil disobedience, nonviolent resistance, marches, protests, boycotts, freedom rides and rallies. Their efforts, however, were met with arrests, beatings and bombings. Official Mississippi and the majority of the white community fought strenuously to enforce the "separate but equal" rule in order to segregate the races in public schools, as well as in transportation, recreation, and public accommodations, such as hotels and restaurants. Activists were visited with violence, even death. Many places identified with the Civil Rights Movement were destroyed, including homes, churches and schools.

Tougaloo College, was often subjected to attacks as it was considered by many to be the center of the Civil Rights Movement in Mississippi. Many people in Mississippi came to our campus to help lead the movement. Tougaloo's chaplain, Ed King, and a history professor, John Saulter, were at the forefront. Also, numerous attorneys from around the country frequently visited the campus to take part in the effort, as did important leaders such as Martin Luther King, Jr. and Ralph Bunche.

I participated in many of these efforts. Doing so strengthened my longing to become an attorney as I gained a greater understanding as to how the legal system could be used to overcome the many obstacles to justice and equality. By taking part in many of the meetings on Tougaloo's campus, I came to understand that success in the Courts could lead to changes in society-changes for the better.

Later, I reasoned that in order to be successful as an attorney in Mississippi, it would benefit me to attend the University of Mississippi Law School. First, most of the lawyers who would be opposing me in the courtroom in the future were attending there. As lawyers, these people would likely have a tremendous influence on our state. Ole Miss also had the diploma privilege at the time and that removed one hurdle and sped up the process of becoming a lawyer. The law school had produced many distinguished attorneys, and had a reputation as being one of the premier law schools in the South. Like the rest of Mississippi, however, the University of Mississippi, even in 1964, was a bastion of segregation and white supremacy. In fact, the University of Mississippi had only recently been the site of one of the most contentious battles of that era.

During 1961, my sophomore year at Tougaloo, the story of James Meredith garnered national attention. I remember learning that James Meredith applied several times to the University of Mississippi's undergraduate program. Each time, however, his application was rejected. After several months of legal contests, Meredith was admitted in 1962, much to the consternation of segregationists. I remember state officials, including the governor of Mississippi at the time, declaring that the University of Mississippi would never be integrated. I watched keenly as the governor went so far as to direct state police to the campus in order to bar Meredith's admission. After days of violence, destruction and death, Meredith accompanied by federal authorities, was admitted on October 1, 1962, a date I remember vividly. For weeks thereafter, I read articles and listened to reports of violence encountered by Meredith on the University of Mississippi campus. Each story of his courage and perseverance inspired me.

Upon graduating from Tougaloo in 1964, I applied to the University of Mississippi Law School. In order to be admitted, the law school required that applicants obtain the signature of five attorneys who had graduated from the law school. At the time, I did not know five attorneys, much less five attorneys that had graduated from the University of Mississippi Law

School. As a result, my application was rejected. I was told by school officials that because I could not obtain the required signatures, I could not be admitted.

Subsequently, my mentor, Jack Young, arranged for me to attend law school at Southern University in Baton Rouge, Louisiana. I enrolled at Southern in the fall of 1964. When I arrived, there were a total of three students in my first year class. Such a small class made for a very long first year of law school. That year, however, paled in comparison to what lay ahead.

While at Southern University, I heard stories of University of Mississippi law professors being fired for supporting integration. Later that same year, I received a letter from the University of Mississippi Law School. The letter, which came unexpectedly, invited me to enroll. The letter also indicated that the law school was offering me a scholarship. Unbeknownst to me at the time, the law school staff had undergone a significant transformation. There was a new dean, Josh Morse III. Morse, a native Mississippian who had gone to law school at Yale, sought to ensure that the law school become much more a receptive to enrolling African-American students. He, along with several law professors recruited by him from Yale and elsewhere, worked diligently to bring this plan to fruition.

Upon completing my year at Southern University, I accepted the invitation and the scholarship and transferred to the University of Mississippi Law School in 1965. At the time, an aura of resistance still enveloped the city of Oxford, as the University remained a battleground in the fight for civil rights. This atmosphere made my final two years of law school two of the most difficult years of my life.

Upon arriving, I quickly learned that the deep-rooted feelings of racism resonated with students and faculty alike. I arrived on campus only to be greeted with jeers, racial slurs and insults. It was extremely difficult for me to make any friends in the law school. In fact, when I entered and sat down in my classes, many students often got up and moved to the opposite side of the room. All of this was anticipated, though.

Even more difficult than dealing with the taunts of the Oxford residents and law school students was accepting the harassment inflicted by many of my professors. Most of them, it seemed, were intent on making my matriculation difficult. Many of my professors unabashedly discriminated against me. Although I was a student in their class for a full semester or more, many of them shamelessly refused to acknowledge my presence. As such, getting through law school was an arduous task.

Although I felt alone in the law school, there were places where I found support. During my first year there in law school, there were about seven African-American students at Ole Miss, all but two of us in the undergraduate program. The harassment that the undergraduates sustained was much more horrific than that I encountered. We shared our experiences and because of this, we became a close-knit group. Indeed, those seven students were the closest friends I had during my time at the University of Mississippi. They inspired, encouraged and supported me in ways that were beneficial, and in ways that I think served me well in the years after my time at the University.

Because we spent a tremendous amount of time together, we were often harassed as a group. Often, we were the first of our race to dine at certain restaurants or go to certain movie theaters in Oxford. One particular event stands out in my mind. During my first year at the law school, all of the African-American students decided to attend a University of Mississippi football game. That day, the opponent was the University of Houston. As I recall it, Ole Miss had beaten the University of Houston in each of their previous twenty meetings. On that day, however, the University of Houston trounced the Rebels. The game was not even close. The best player on the Houston team was an African-American named Warren McVey. It seemed as if McVey had beaten Ole Miss all by himself. McVey's athletic prowess was evident not only to me, but to every single fan in the stadium that day.

Understandably, the Ole Miss fans were not happy. Towards the end of the game, a number of the students turned their attention from the African-American on the field to the African-Americans in the stands. They began to throw rocks, ice and everything else they could get their hands on. I, along with the other African-American students, ran out of the stadium while being plastered with everything the Ole Miss faithful could get their hands on.

During my entire two years at the University of Mississippi, I endured much of the same. Nevertheless, in 1967, I became the first African-American graduate of the University of Mississippi Law School. The law school was founded in 1854. It took over one hundred years *after the Civil War* to admit and graduate its first African-American student. After my admission though, the law school, under the leadership of Dean Josh Morse, began to admit more and more African-Americans. Remarkably, a few years after I graduated, the University of Mississippi Law School was second only to Harvard, among predominantly white law schools, in the number of African-Americans enrolled and graduated.

Because of its contentious past, in the years that followed, the University of Mississippi and the University of Mississippi Law School faced tremendous scrutiny. Many watched to see if, and how, the University could move towards a new future. Despite this intense examination, the University developed admirably as is evidenced by its many achievements.

In 1970, the Black Law Students Association was formed as a support group for minority students in law school. Four years later, and seven years after I graduated, A.C. Wharton became the first African-American professor on the law school faculty. In 1982, the first organization for African-American faculty and staff was formed. The following year, an Affirmative Action Office was created to monitor and evaluate the University's affirmative action and equal opportunity programs. Moreover, in 1987, the University made a commitment to minority graduate education. As a result, there has been a tremendous increase in the number of graduate degrees awarded to minorities. Prior to 1987, only 44 were awarded. Since then, over 400 have been awarded.

There are several other accomplishments of note. For instance, in 1993, Dean Louis Westerfield, became the first African-American dean of the law school. Also, in 1996, an African-American ranked as the number one student in the law school, and two others were among the top ten. More recently, in 2002, the law school student body elected its first African-American president.

The University of Mississippi, as well as the law school, has also recognized the significance of having enrolled and graduated African-American students. This is reflected in several awards the University has provided. In 1983, I, along with Rose Jackson Flenorl became the first alumni appointed to the Alumni Association's Board of Directors. In 1995, I served as the Jamie L. Whitten Chair of Law and Government at the University. That same year, I became the first African-American alumnus to be named to the University's Alumni Hall of Fame. Ironically, the induction ceremony took place on the University's football filed, the same football field from which I ran for my life some thirty years prior.

As I conclude my reflection, I want to say again how pleased I am to have been asked to participate in the law school's sesquicentennial celebration. My devotion to the University of Mississippi Law School has continued to develop as the University has made tremendous efforts to move beyond its troubled past. The sesquicentennial celebration is an appropriate tribute to a law school so dedicated to progress. I am proud to be a part of this history.

As I expected even before I began law school, my association with the University of Mississippi Law School has provided numerous rewards, both tangible and intangible. Since I graduated from the law school, I have worked as a civil rights attorney, a civil defense attorney and held numerous positions with private corporations. I have also served as President of the Mississippi Bar and as a member of the Mississippi judiciary at every level including the Mississippi Supreme Court. My experiences at the law school have undoubtedly had a remarkable affect on my work as an attorney. I have never bought into the belief that Mississippi is limited by its past.

Rather, I believe that we can transcend any such boundaries unfortunately created. Within each crisis is a greater challenge and opportunity not only to succeed, but also to inspire those around us for years to come. Thus, as an alumnus, I believe in maintaining a profound attachment to the law school and to the students following in my footsteps. The force of my convictions is attributable in no small part to the successful efforts of Josh Morse and others to transform the school. Their work demonstrates that people make the institution, not vice versa, and, if we want an institution that is to be respected by all, people of good will have to take the risks and make the effort to make it so.

LAW SCHOOL REFLECTIONS

Constance Iona Slaughter-Harvey[*]

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us.
>
> \- Charles Dickens

I never met Charles Dickens. I did not grow up during the French Revolution about which he wrote these words. But I did come of age during a revolution, a bloody and painful revolution which left physical and spiritual scars on a generation of Americans that is only now beginning to heal. Please reread Mr. Dickens' words before you move forward with my own. To understand them is to look directly into my soul as it existed some three decades ago while a student entering the University of Mississippi School of Law. My revolution was, of course, the Civil Rights Movement. One of my most challenging battlefields was Oxford, Mississippi.

There is a certain enthusiasm that accompanies youth and that can never quite be recaptured after one's youth is gone. Certainly there are other forms of enthusiasm which endure cradle to grave, but the peculiar sense that the whole world lies before us and that it is truly ours on which to leave a mark, that confidence bordering on arrogance that has never yet known true defeat, that hope that a brave new world will be formed during our lifetime and that we will be integral to its formation—these feelings are the province of youth alone.

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While most students at the University of Mississippi in the late 1960s were reveling in these emotions, I was instead fighting for my life. I was robbed of the chance to be innocent, and it is a crime for which justice has never quite been fully served. It should have been the best of times, and there were those moments such as special friendships formed with Dean Josh Morse and Professor Joel Blass, who later served as Mississippi Supreme Court Justice. I am also especially proud of my role as one of the national founders of the Black American Law Students Association at Rutgers University in 1969.

For every one of these "best of times," however, there was a "worst of times" to offset it. One of my professors used the word "Nigra" in class, and I was almost hit in the head by a bottle thrown at me by a white student at a football game at which the University was playing the University of Houston which started black quarterback Warren McVeigh. As I climbed the bleachers to reach him, the game was suspended and Chief Tatum escorted all black students out of the stadium.

That was the last football game I attended in my lifetime except for one during which my daughter was making a speech as student body president of Forest High School. I remember with tears in my soul, if not my eyes, the outright celebration which ensued among some of my white law school classmates when Dr. King was assassinated. I remember several fights with white law students during that time. And I remember having to stand on my tip toes to be seen during our graduation picture because there appeared to be a deliberate attempt to conceal me as the first female African-American graduate of the law school. I did not march in my own graduation.

And all of these "worst of times" pale by comparison to knowing that my parents had to add to their prayers every night that I would not be murdered by one of several people making very serious death threats against me. One never quite recovers from the image of one's godly mother kneeling in tears to pray that the life of her child be spared when that child was engaged simply in the pursuit of bettering herself and her race through channels guaranteed by the Constitution and by principles of basic human decency.

It is only fair to note that the University has come a long way. It is also realistic and fair to observe that it has some distance left to go. My more recent experiences with the University have been much more positive such as accepting the Distinguished Black Mississippian Award from Chancellor Gerald Turner, having the University's chapter of the Black American Law Students Association named the Constance Slaughter-Harvey BALSA Chapter, receiving the Law School Faculty Award from the first African American Law School Dean Lewis Westerfield , and the Mississippi School of Law's 2001 Public Service Award which was presented by the present Law School Dean Sam Davis.

Some years ago the Mississippi Legislature pressured Dean Morse to resign after he recruited more than 10 African-American students to the law school and endorsed the North Mississippi Rural Legal Services program. The changing complexion of the legislature now affords more autonomy to the law school leadership, but that body still exerts undue influence from time to time. Outside of this state's borders, "Ole Miss" is the university most associated with Mississippi. Inside our borders, its symbols and traditions are the ones many citizens fight most passionately to preserve. As long as the University is called "Ole Miss," the specter of "Ole Massa" will always remain. I look forward to a day when the University is referred to as the University and there will be no Colonel Rebel or rebel flag associated with my alma mater. Names and symbols are deceptively powerful tools of intimidation used to effectively preserve the status quo, and integration in the flesh cannot fully translate into integration of the spirit until these traditions are banished.

Noted human rights leaders including Dr. King have spoken about going to the mountaintop and seeing the promised land. Mountains are an excellent symbol for my struggle at the University of Mississippi School of Law. Mountains are rugged terrain with very steep grades that are difficult to climb. The higher you climb, the more changeable and unpredictable the conditions you will find. No matter if you start out with a guide or a companion, ultimately we all either make it to the summit or fall off the face of the peak on our own and solitary. Some mountains give the illusion of extending almost to heaven as they break through the clouds, while others are rooted in the very bottom of the ocean too deep to even be explored by a finite creature such as man.

At the University, by the grace of God, I did journey to the mountaintop and stick my flag into the rocky dirt of the future. I had to climb over the past and the present to get there. Occasionally since then I have felt that we had nothing before us as I tried cases in front of prejudiced judges and juries that had determined the verdict before I even spoke. But mostly, I feel now what I reached deep down inside myself to feel even then—that we have everything before us and that the promised land of social justice is a real place that will one day be reached rather than a hollow ideal for which so many have sacrificed so much. Vain sacrifice would simply be more irony than I could stand, and so I wake up every day with my compass in hand and share my map with all who will follow it.

BECOMING A CITIZEN

John Taylor Moses[*]

I must come clean: the primary reason for my enrollment in Ole Miss law school in 2000 was to preserve three more years in my beloved Oxford while further developing my creative writing pursuits. I wanted, in a sense, to postpone the world of calendars and appointments and regular hours, to cling to the aesthetic pleasures of a morning golf round on afternoon class days; happy hour at three rather than six; the sight of Delta coeds littering the sidewalks on fall afternoons. During undergraduate, Oxford and Ole Miss had subconsciously transformed from my college of choice and the town in which it just happened to be located into, quite simply, home. I had been away for an entire year—lived on a ranch out west, worked for a law firm and my old man, traveled to Greece for an entire month. My legs were stretched, any boredom I felt towards old Lafayette County erased during my twelve-month hiatus. The Square was calling, and I called back. I would focus on writing, and fit in my legal studies accordingly. Never did I imagine, and I mean this with all the sincerity that a cliché can muster, that I would come to love the law. Love the maddening order of procedure. Love our country's greatest civic challenge: to attempt resolution of its citizens' disputes.

Ole Miss law settles upon you, sinks in, begins to break you down. I realized, for the first time in my academic life, that I would not ultimately be in control of the grade I received for my efforts. The night before our first exam, Civil Procedure, I insisted to a friend that *Klaxton v. Stenor Electric* would absolutely not find its way onto the test, as Professor Czarnetsky had barely mentioned it in class. So let's move on, I said, not waste any time. Only four questions appeared on our exam the next morning, and numero uno was: Explain *Klaxton*. I turned apprehensively in my seat to encounter my friend's disgusted gaze. Well, I thought, at least I won't have to worry about finishing the exam on time. I came out pretty well on the test, even though leaving that first question blank left me feeling like a failure. It proved a similar lesson to countless other experiences in law school, all resulting in an analogous moral greatly useful on the road ahead—things usually won't turn out as you imagine, or how you have them drawn up, and though your immediate reactionary thought will probably be catastrophic, the ultimate outcome will almost always be acceptable, or at least bearable.

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It remains undeniable that law school *changes* the way one thinks. Some internal structure of the mind shifts, progresses, or according to some, warps. Deep into my first year, I couldn't fathom how I had made it through my short life without understanding that our country had parallel state and federal legal systems, that a federal judge sitting in diversity would apply the appropriate state law, that I was not subject to personal jurisdiction in most states of the Union. It's almost shocking to learn of a body of knowledge that you didn't even know existed. All of a sudden, I realized how badly journalists wrote about lawsuits and trials and class actions, simply because they didn't have a basic understanding of the system. Law school is advanced civics, and hopefully somewhere along the line, somewhere between foreign sovereign immunity and abstention, the law school student realizes that this stuff is worth learning for its own sake. Not to make $75,000 your first year out writing employee vs. independent contractor memos and responding to trivial discovery, but because we live within the law. It surrounds us, always, and could at any time play a part in our lives, affect the consequences of our actions, professionally and personally. I'm not sure one can ever fully grasp the concept of being a citizen without learning something about how the law is created, passed, applied, amended, and sometimes tweeked by judges occasionally swayed by politics, passion, or what they believe to be the greater good. Despite my best efforts and to the detriment of my golf game and creative fiction, Ole Miss law was fast becoming the central player in my life. I discovered my competence at oral argument; found myself on the 5th floor chatting about criminal procedure with Jack Nowlin. I knew Professor Cochran liked me when he referred to me as an idiot several times in Con Law II and Federal Jurisdiction. As a Hemingway-loving English major, never did I imagine that I would ever write a piece entitled *Mandatory IOLTA Program Constitutes Per Se Taking*, then have it rendered futile, never to be cited, due to the Supremes reversing our beloved Fifth Circuit. Slowly but surely law school becomes a lifestyle, its language and special jargon dominating conversations between classmates, whether up at school or at the bar on Friday night. Case names become part of one's established memory. Procedure, scarily, becomes interesting.

The world looks, reads, and sounds different following my years at Ole Miss law. I find myself more engaged with the challenges facing our society, more aware of its triumphs. I am more able to spot our politicians thinly disguised rhetoric, to hear the difference between substance and spin as we are daily bombarded with an endless stream of media content. Most importantly yet rarely recognized, Ole Miss law prepared me for the numerous disappointments I will experience in my personal and professional life. Until law school, most students are capable of controlling their own destiny when it comes to grades and accomplishment. Law school delivered to many, including me, that first taste of getting less than what you feel you deserve, for the results not to match the dedication and pure intention. Law school forces one to deal with this troubling emotion, to pass through the states of anger, regret, and acceptance as we all will have to do countless times in the years ahead. One needs no preparation for success, accomplishment, and joy; they feel as natural as breathing, walking. Proper navigation of deeply troubled waters takes practice and patience, and is necessary to not only I believe the successful practice of law, but also in handling the general storms of life. This underlying education provided by Ole Miss law, while not as obvious as the elements of negligence, will possibly prove more valuable than the rules and concepts in our casebooks.

Looking back, I actually wish that law school lasted longer. Three years moves so fast when you are constantly engrossed with securing a job post-graduation. It would have been nice to wallow in that academic life a little longer, before the daily grind of practicing law takes hold. Despite its brevity, I hold fond memories from my years at Ole Miss law: going to New York City with Professor Hall, Tobi Longwitz, and Vanessa Bird to argue at the National Moot Court Finals; traveling to Washington D.C. with the Supreme Court Practice class and Professor Cochran to hear oral arguments in the case we were studying; daily mingling with classmates in the library and on the grounds. And while the aesthetic pleasures of learning the law in a town I consider the crown jewel of the south are innumerable and endless (*see* all of my other writings), the intellectual substance of my legal education ultimately stands out as the most valuable gift Ole Miss law bestowed upon me. May 150 years represent only a beginning.

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TABLE OF CONTENTS

THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: REFLECTING ON 150 YEARS

THE OLE MISS LAW SCHOOL 1939-1942 .... *Robert C. Cannada* i
COMMENTS FROM A FORMER DEAN .... *Parham Williams* xi
LAW SCHOOL RECOLLECTIONS 1953-1955 .... *Lenore L. Prather* xxiii
REFLECTIONS—MY EXPERIENCE AT THE UNIVERSITY OF MISSISSIPPI LAW SCHOOL .... *Reuben V. Anderson* xxvii
LAW SCHOOL REFLECTIONS .... *Constance Iona Slaughter-Harvey* xxxv
BECOMING A CITIZEN .... *John Taylor Moses* xxxix

ARTICLES

INDIRECT HARMS AND PROPORTIONALITY: THE UPSIDE-DOWN WORLD OF FEDERAL SENTENCING .... *Mark Osler* 1
SEPARATION OF POWERS AT THE STATE LEVEL, PART II: SERVICE IN A CIVILIAN PUBLIC OFFICE AND IN THE NATIONAL GUARD .... *Judge Leslie H. Southwick* 47
LESSER INCLUDED OFFENSES IN MISSISSIPPI .... *Michael H. Hoffheimer* 135

COMMENT

SALVATION LIES WITHIN: WHY THE MISSISSIPPI SUPREME COURT CAN AND SHOULD STEP IN TO SOLVE MISSISSIPPI'S INDIGENT DEFENSE CRISIS . . . . *Erin V. Everett* 213

RECENT DECISION

CONSTITUTIONAL LAW—ELEVENTH AMENDMENT—ABROGATION OF STATES' SOVEREIGN IMMUNITY IN TITLE II OF THE AMERICANS WITH DISABILITIES ACT HELD A VALID EXERCISE OF CONGRESS'S FOURTEENTH AMENDMENT SECTION FIVE POWER . . . . *Edward J. Everitt* 253

INDIRECT HARMS AND PROPORTIONALITY: THE UPSIDE-DOWN WORLD OF FEDERAL SENTENCING

Mark Osler[*]

I. INTRODUCTION

The Federal Sentencing Guidelines are an exceedingly precise legal instrument, putting nearly all federal crimes in rank order of seriousness by assigning each an "offense level," with a higher offense level indicating a more serious crime and a longer sentence.[1] Under these Guidelines, a woman who holds just six grams of crack for her own use is assigned a higher offense level (twenty-six)[2] than someone who commits criminal sexual abuse of a minor (offense level twenty-four),[3] a man who commits negligent homicide by recklessly shaking a baby to death (offense level eighteen),[4] a woman caught stealing six million dollars of public money (offense level twenty-four),[5] or the executive who orders employees to dump a truckload of toxic waste knowing that people may die as a result (twenty-four).[6] The crack possessor, in fact, receives the same offense level as that applicable to those who finance terrorist organizations (offense level twenty-six).[7] That's right—possessing crack is treated the same as funding al-Qaeda.

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[1] The mechanism for calculating an offense level is described at U.S. SENTENCING GUIDELINES MANUAL § 1B1.2 (2003).

[2] This would be a violation of 21 U.S.C. § 841 (2000). The Guideline range for such an offense is sixty-three to seventy-eight months of incarceration, based on an offense level of twenty-six, and assuming no criminal history and sentencing after trial without a statement of responsibility being made to the government. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(7), 5A (2003). The Guidelines treat simple possession of more than five grams of crack in the same manner as trafficking. *Id.* § 2D2.1(b)(1).

[3] This would be a violation of 18 U.S.C. § 2243(a) (2000), leading to a base offense level of twenty-four and a sentencing range of fifty-one to sixty-three months, again assuming no criminal history and sentencing after trial with no credit for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL §§ 2A3.2(a)(1), 5A (2003). In fact, if no aggravating factors existed, the provisions of Guidelines section 2A3.2(b)(4) would drive the offense level down by six points, to eighteen, with a resulting sentence of twenty-seven to thirty-three months. *Id.*

[4] As an Involuntary Manslaughter under 18 U.S.C. § 1112 (1994), an offense level of eighteen would apply, leading to a Guideline range of twenty-seven to thirty-three months, again assuming no criminal history and sentencing after trial with no credit for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.4(a)(2) (2003).

There is something wrong with this system where killers are better off than drug possessors—a skewed sense of proportionality that too often directs harsher sentences for actions which create an *indirect* risk of harm to others than they do for the act which directly causes that harm. In the case of narcotics, for example, some justify harsh sentences in large part because drug use can lead to violent crimes and other social ills.[8] However, paradoxically, the Guidelines direct judges to deal more harshly with the narcotics possessor, who threatens to create conditions leading to violence, than a killer himself, who actually brings that threat to fruition.[9]

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[5] The theft of public money is prohibited by 18 U.S.C. § 641 (1994). Such a theft of six million dollars would result in an offense level of twenty-four and a Guideline range of fifty-one to sixty-three months, again assuming no criminal history and sentencing after trial with no credit for acceptance of responsibility. *Id.* §§ 2B1.(a)(2), (b)(1)(J), 5A (2003).

[6] The dumping of toxic waste with the knowledge that people could die as a result may be prosecuted under 33 U.S.C. § 1319(c)(3), which then leads to an offense level of twenty-four under the guidelines, and incarceration for between fifty-one and sixty-three months, again assuming no criminal history and sentencing after trial with no credit for acceptance of responsibility. *Id.* §§ 2Q1.1(a), 5A (2003). Application note 1 to section 2Q1.1 does note that an upward departure may be warranted if death results.

[7] Such material support of known terrorist organizations is prosecuted under 18 U.S.C. § 2339B (2000), with a base offense level of twenty-six and presumptive guideline range of sixty-three to seventy-eight months of incarceration. U.S. SENTENCING GUIDELINES MANUAL §§ 2M5.3(a) (2003).

[8] For example, in supporting drastic new mandatory sentences for crack cocaine, Senator Paula Hawkins of Florida cited a Newsweek article which stated that, "[w]herever it appears, it spawns vicious violence among dealers and dopers and a startling increase in petty crime; in New York . . . police believe it is the primary cause of an 18 percent jump in robberies early this year." 132 CONG. REC. S7123-01 (1986) (quoting Tom Morganthau et al., *Crack and Crime*, NEWSWEEK, June 16, 1986, at 16). These concerns also found their way into congressional findings. In the National Narcotics Act of 1984, Congress specifically found that "[i]ncreased drug trafficking is strongly linked to violent, addiction-related crime" and that "[c]ontrolling the supply of illicit drugs is a key to reducing the crime epidemic confronting every region of the country." National Narcotics Act of 1984, Pub. L. No. 98-473, § 1301(a)(7), (9), 98 Stat. 2168, 2168, *repealed by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1007(a)(3), 102 Stat. 4187. The

The uncertainty related to the United States Supreme Court's decision in *Blakely v. Washington*[10] is unlikely to affect this substantial problem of proportionality.[11] The Guidelines, in one form or another (mandatory or advisory) are likely to survive, leaving the determinative offense levels vulnerable to the attack leveled here.[12] After the *Blakely* storm has passed, the strange terrain of proportionality will remain, and requires correction.

The Sentencing Guidelines themselves describe the process of assigning different sentences to different crimes as "proportionality."[13] The twisted proportionality of the Guidelines described above may be most striking when we examine

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Drug Enforcement Administration's present view is that the spread of drug gangs "results in an increase in homicides, armed robberies, and assaults as gang members use physical violence to maintain their drug distribution monopolies." Drug Enforcement Administration, *Drug Trafficking in the United States, at www.dea.gov/concern/drug_traffickingp.html* [hereinafter *Trafficking*]. A further description of the link between drugs and violent crime is found in Section III(E), *supra*. This article assumes that there is, in fact, a link between drug trafficking and use and violent crime. *Id.*

[9] *See supra* notes 1, 2. Under the Guidelines the offense level for possessing six grams of crack is greater than that for someone who commits manslaughter. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 2A1.3(a) (2003). However, the sentence for a first or second-degree murder would be greater than that for a narcotics offense, based on an offense level of forty-three for first-degree murder, and thirty-three for second-degree murder. *Id.* §§ 2A1.1(a), 2A1.2(a).

[10] 124 S. Ct. 2531 (2004).

[11] The *Blakely* decision struck down a sentencing scheme from the state of Washington which was substantially similar to the Federal Guidelines because it allowed sentence ranges to be adjusted upward without a jury finding in violation of the Sixth Amendment right to a jury trial. *Blakely*, 124 S. Ct. at 2536-38.

[12] Justice Breyer, in his dissent to the *Blakely* majority, describes the possible effects on the Federal Guidelines and describes three potential reactions: more restrictive guidelines, a return to discretionary sentencing without guidelines, or allowing jury proofs of sentencing factors. *Id.* at 2552-2554 (Breyer, J., dissenting). Even were the second option employed in the federal system, the Guidelines would likely be retained as an advisory tool, and would continue to direct federal sentences.

[13] U.S. SENTENCING GUIDELINES MANUAL § 1A.1(A)(3) (2003) (defining proportionality as "a system that imposes appropriately different sentences for criminal conduct of differing severity").

the oft-cited example of crack,[14] but the example of narcotics is just part of a larger dysfunctional whole which includes at least four other sections of the Guidelines.

First, in child pornography cases, the sentence for an individual who sends a computer image of "virtual" child pornography, made without the use of actual children, would face[15] a sentence twice as harsh as that allowed under the Guidelines for a defendant who *actually rapes* a child.[16] Why is the first sentence so harsh? Ironically enough, it is supposedly justified because virtual child pornography threatens to lead to the actual abuse of children.[17]

Second, the unreported transfer of large amounts of cash is illegal[18] because it may support other outlawed activities such as theft.[19] But, as we will see, the sentence for such a cash transfer, even in the complete absence of proof that there was any underlying illegal activity, leads to greater punishment than that allocated to the woman who *actually steals* the same amount of money.[20]

Third, the production of counterfeit identity documents poses the threat that those documents may be used by people to immigrate illegally.[21] Fair enough. But, once again, the Guidelines punish the person who provides a single document more harshly than the one who then *uses* that same document to sneak into the country.[22]

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[14] By weight, crack is no longer alone in being so harshly punished. Pure methamphetamine now is held to the same penalties by the Guidelines. *Id.* § 2D1.1(c)(7).

[15] The Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), struck down the Child Pornography Prevention Act of 1996's ban on "virtual" child pornography produced without using actual children, but the PROTECT Act of 2003 attempts to reword that statute to make it legal, an attempt which may or may not pass Constitutional muster. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 502, 117 Stat. 650 [hereinafter PROTECT Act].

[16] *See* discussion *infra* Section III.A.

[17] *Id.*

[18] 31 U.S.C. § 5316(a)(1) limits unreported currency over ten thousand dollars from entering or leaving the country.

[19] *See* discussion *infra* Section III.B.

[20] *Id.*

[21] *See* discussion *infra* Section III.C.

[22] *Id.*

Fourth, the danger of illegally possessed firearms is clear—they may be used for violence.[23] Under the Guidelines, however, the punishment for possessing the weapon, which constitutes a threat, is often more severe than that for actually using a gun in a violent crime.[24]

This Article strives to describe this strange "proportionality," to identify specific parts of the Guidelines where it is found, to examine possible justifications for such a mechanism, and to suggest reforms.

As part of this project, I have looked to the Guidelines on their face under the simplest charge available, rather than sentences which have been reported in discrete types of cases.[25] The Guidelines, of course, lend themselves easily to such an analysis, for two reasons. First, they are number-driven and result in finite sentencing ranges, making quantitative comparisons easy and meaningful. Second, the Guidelines are not just suggestions, but are *directive*—they are intended to create uniformity by mandating specific sentences.[26] Thus, they can be evaluated on their face as to the fairness of the sentences they mandate.

Further, this facial analysis avoids complications created by the judicial subversion of the Guidelines through downward departures, which the Feeney Amendment[27] so roughly rebuked. At least some of these departures, of course, were likely motivated in part by the fact that many United States district court judges do not agree with the supposed proportionality built into the Guidelines—that is, the decision-makers themselves are rejecting the proportionality analysis of the Guidelines, and are substituting their own.[28]

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[23] *See* discussion *infra* Section III.D.

[24] *Id.*

[25] To be fair, I have tried to use the simplest charge on both sides of any comparison. For example, in looking at virtual child pornography, I assume on the one hand the transmission of a single image, and compare that with a simple statutory rape. *See* discussion *supra* Section III.A.

[26] As the Guidelines themselves put it, "Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed . . . for similar criminal conduct by similar offenders." U.S. SENTENCING GUIDELINES MANUAL, § 1A1.(A)(3) (2003). From the beginning, *uniformity* was given precedence as a goal of the Guidelines. In reflecting on his role in the formation of the Guidelines, Justice Stephen Breyer (a member of the original Sentencing Commission) recalls that the sentencing ranges were arrived at simply by codifying "typical, or average, actual past practice." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988).

[27] The Feeney Amendment, which restricted downward departures by federal judges, was passed on April 30, 2003 as part of the PROTECT Act, *supra* note

There is a solution to this mess, and it does not involve downward departures. Rather, the offense levels of the Guidelines themselves need to be adjusted so that we more directly attack that which causes harm to victims instead of that which indirectly may allow for such wrongs.

Section II briefly reviews the somewhat aimless path the Guidelines have taken to their present view of proportionality. Section III, in turn, describes those Guideline sections which specifically direct harsher penalties for crimes which indirectly threaten harm than those for crimes directly causing that harm, identifying five such pairs of offenses: child pornography and child sexual abuse, cash smuggling and theft or fraud, fraudulent documentation and illegal immigration, firearms possession and use, and narcotics and violent crimes. Section IV explores the possible rationales for treating indirect threats so harshly. Finally, Section V suggests specific ways that the Sentencing Commission can address this paradox, even within the constraints of the Feeney Amendment.[29] Primarily, I ask that the Sentencing Commission and Congress use the punishment for the ultimate harm as a baseline in developing sentences for crimes which are punished in part based on the indirect threat they pose. Specifically, it would make sense to hold base offense levels for such "threat" crimes to two-thirds of the base offense levels for the ultimate harm which may be caused. Such an operating principle would at

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[28] As one judge and commentator see it, "[t]he exercise of what we term 'hidden' discretion by both judges and prosecutors mocks the precision and obduracy of the Guidelines' sentencing calculus, while at the same time contributing to disparity in sentencing outcomes and cynicism about the criminal justice system." KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 7 (1998).

[29] PROTECT Act, *supra* note 15.

least begin to connect proportionality to actual comparisons between crimes—something that should have been part of the process all along.

II. THE GUIDELINES AND THE ESTABLISHMENT OF PROPORTIONALITY

At its simplest level, criminal law puts a box around criminal behavior, defining for a society the line between what is allowable and what is punishable. The job of the federal Sentencing Guidelines is only slightly more refined: It sorts out and puts in rank order those behaviors which lay outside the box defined by the criminal statutes. This is done by very specifically assigning sentences of incarceration, in month-specific ranges, to various crimes, a process referred to in the Guidelines as establishing "proportionality."[30] In so doing, of course, it expresses with great precision public values[31] about the relative culpability of people and their actions.[32]

One of the striking things about the Guidelines is a plodding reliance on mathematics[33]—a much more certain discipline than that practiced by attorneys in the courtroom, who constantly battle in the gray areas of witness credibility, comparative fault, reasonable doubt and other vaguely-defined notions. Out of the midst of this swamp the Guidelines have risen,[34] and they are jarringly different than the rest of criminal law in propounding precise numerical answers without individual consideration of the defendant.[35]

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[30] Federal sentences under the Guidelines are determined based on two factors: An "offense level," which is determined by the facts of the case, and a "criminal history category," which is determined by prior convictions. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(g) (2003).

[31] The public values addressed here are those that can be drawn from the face of the federal sentencing guidelines themselves, rather than the traditional goals of sentencing (retribution, deterrence, incapacitation and rehabilitation), in which the Guidelines are supposedly rooted. *Id.* § 1A1.1(A)(2). As I have argued in a previous article, these traditional goals were, in fact, set aside in developing the Guidelines and are not reflected in the Guidelines in their current form. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649 (2003).

[32] Though some contend that "the offense levels do not translate into any type of simple intuition, much less any judgement about relative 'deservedness[,]'" this ignores the bare fact that the guideline ranges, like the criminal statutes they support, are intended to be normative. Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers,* 9 GEO. MASON L. REV. 1001, 1015 (2001). The Guidelines themselves hold out as one of their charter goals "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S. SENTENCING GUIDELINES MANUAL §1A1.1(A)(3) (2003). Even if this proportionality was achieved initially by incorporating existing practices, *id.*, this in no way undercuts the fact that the Guidelines express normative values.

In the language of the Guidelines, "proportionality" is defined as "a system that imposes appropriately different sentences for criminal conduct of different severity."[36] As the Guidelines' own preamble sets out, the idea of proportionality was subsumed under a larger debate. Adherents of "just desserts,"[37] wanted to straightforwardly establish the Guidelines rigidly according to a doctrine of proportionality which maintains that "punishment should be scaled to the offender's culpability and the resulting harms."[38] Opposed to this view were those who felt that practical "crime control" considerations should be paramount,[39] meaning that the Commission should mandate "sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant."[40]

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[33] For example section 2D1.1 contains not only numerical tables for adding up the offense level relative to the weight of narcotics, but drug equivalency tables which allow conversion of these amounts to a common standard, and a measurement table for converting ounces to grams. *Id.* § 2D1.1. Similarly, section 3D1.4 contains a challenging formula for combining the scores for multiple offenses, which involves conversion of offense levels to "units" and then to a new offense level. *Id.* § 3D1.4.

[34] Along with the Guidelines has risen their fellow-travelers, the statutory minimum sentencing schemes. 21 U.S.C. § 841 (2000).

[35] The loss of such individual consideration has been widely criticized. *See generally* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines,* 76 NOTRE DAME L. REV. 21 (2000); Marc Miller, *Purposes at Sentencing,* 66 S. CAL. L. REV. 413 (1992); Daniel J. Freed & Marc Miller, *Editor's Observations: Taking "Purposes" Seriously: The Neglected Requirement of Guideline Sentencing,* 3 FED. SENTENCING REP. R. 6 (1991) (introducing issue devoted to the purposes of sentencing).

[36] U.S. SENTENCING GUIDELINES MANUAL § A1.1(A)(3) (2003).

[37] *Id.*

[38] *Id.*

[39] It is unclear from the text of section 1A1.1(A)(3) how these considerations are inconsistent at the practical level. *Id.*

In the end, the Sentencing Commission resolved this conflict by taking a comprehensive survey of pre-existing sentencing patterns for particular types of crimes, and then codifying those practices into the Guidelines.[41] Justice Stephen Breyer, then a judge on the Court of Appeals for the First Circuit, served on the Sentencing Commission that drafted the first set of Sentencing Guidelines, setting the template which still exists for the great majority of the present document. He recalled that in drafting the Guidelines, the Commission struggled with a crucial dilemma:

> Faced, on the one hand, with those who advocated "just deserts" [sic] but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated "deterrence" but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.[42]

Oddly, this course was followed because of an inability to "rank criminal behavior in detail,"[43] yet in the end, that is precisely what the Guidelines must do—it is a hard-wired system which was established, which assigns a specific number reflecting the severity of each crime.[44] In the end, it appears the Commission admitted its inability to create proportionality by ranking criminal behaviors, yet went ahead with the project of putting in numerical rank order nearly every major crime in the federal penal code.[45] To claim that the result is anything less than this is to deny the existence of the Guideline book itself, which culminates in the grid which so specifically sets out sentences of incarceration, broken into no fewer than 258 boxes, each containing the measure by which liberty of individuals may be taken.[46]

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[40] *Id.* § 1A.1(A)(3).

[41] *Id.*

[42] Breyer, *supra* note 26, at 17.

[43] *Id.*

[44] For each type of case, a specific offense level is propounded by the Guidelines, which will be either higher or lower than that for other types of cases. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(g) (2003).

[45] The sentencing grid sets out forty-three offense levels and six Criminal History categories, each of which defines an axis of the grid. *Id.*

Over time, of course, the Guidelines have been amended, very often under the strict directions of bills passed by Congress,[47] a process that has distorted the original contours of the punishments. Perhaps most notably, Congress has imposed mandatory minimum sentences by statute in many types of cases, including particularly harsh minimums in narcotics,[48] firearms[49] and arson[50] cases. The Commission then was forced to structure the Guideline ranges to take into account these mandatory minimums.

Most recently, Congress passed the PROTECT Act of 2003,[51] which included provisions of what had come to be known as the Feeney Amendment.[52] The Feeney Amendment was directed at what was seen as unwarranted downward departures by federal judges,[53] and it barred some previously-allowable departures,[54] established *de novo* appellate review of departures,[55] prohibited the Sentencing Commission from adding any "new grounds of downward departure to Part K of chapter 5" for two years,[56] and directed the Sentencing Commission to amend the Guidelines to ensure that downward departures in child sexual cases are "substantially reduced."[57] In restricting downward departures, the Feeney Amendment makes proportionality even more important, as the strict guideline numbers will control a greater percentage of cases.

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[46] *Id.*

[47] For example, a specific enhancement for use of a weapon was added to Guidelines section 2A5.2 (interference with flight crew member or flight attendant) by the USA PATRIOT Act. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

[48] 21 U.S.C. § 841(b) (2000).

[49] 18 U.S.C. § 924(e) (2000).

[50] 18 U.S.C. § 844(I) (2000).

[51] PROTECT Act, *supra* note 15.

[52] The principle sponsor of the legislation was Representative Tom Feeney of Florida. Alan Vinegrad, *The Feeney Amendment: Proposed Sentencing Reforms*, N.Y.L.J., Apr. 8, 2003, at 4.

[53] Stephanie Francis Cahill, *Tightening the Reins: Amendment Would Require Federal Judges to Report Sentences to Congress*, 2 ABA J. EREPORT 13, Apr. 4, 2003, LEXIS, News Library, ABA Journal File.

[54] U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.6, 5K2.0, 5K2.13, 5K2.20, 5K2.22 (2003). These changes became effective April 30, 2003.

[55] 18 U.S.C. § 3742(d)(4) (2000).

[56] PROTECT Act, *supra* note 15, § 401(j) (creating a note to 28 U.S.C. § 994

III. THE THREAT AND THE HARM: A BACKWARDS EQUATION

No one seriously disputes that drug trafficking increases murder, robbery and other violent crime. No one seriously disputes that child pornography both causes and promotes the sexual abuse of children. No one seriously disputes that access to firearms increases the harmful use of guns by those who should not have them.

What must be disputed is that each of these causal factors which threaten harm is *more* serious than the resulting harm themselves: That drug trafficking is worse than killing, that possessing child pornography is worse than the sexual abuse of children, and that firearms possession is worse than the use of a gun to illegally hurt or kill. Yet, the United States Sentencing Guidelines makes each of these conclusions by its central process of setting proportionate periods of incarceration. In each case the causal action will very often result in a higher sentence than the resulting harm under the Guidelines. This twisted logic has skewed the justice system and established improper priorities and allocation of resources within federal criminal law, to the detriment of justice.

Nor is it an isolated phenomenon within the Guidelines. Rather, it seems to be a consistent theme. Below, five areas of comparison are analyzed, though this is by no means an exhaustive list.

A. *Child Pornography and Sexual Abuse*

The passage of the PROTECT Act[58] reflected the intense interest in Congress in eradicating child pornography. As the

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(2000)).

[57] *Id.*

[58] PROTECT Act, *supra* note 15.

legislative history to the existing child pornography statute reveals, these laws are based not only on the fact that child pornography harms the children who are used as subjects in making the pornographic images, but also because such pornography encourages pedophiles who view the pornography to commit sexual acts with children.[59]

If we accept these conclusions (and both are accepted for the purposes of this discussion), we are left to compare how the guidelines treat the threat inherent in child pornography with the reality—that is, the punishment for actually sexually abusing children. Admittedly, the punishment for harming children in the *production* of child pornography, set out in Guidelines section 2G2.1 (setting out a base offense level of twenty-seven),[60] is appropriately high. However, what about the portion of the guidelines that deals specifically with the *indirect* threat of such pornography—that it will inspire or aid pedophiles in harming children?

The law provides us with a near-perfect vehicle for comparison—the Guidelines applying to "virtual" child pornography, which can be generated on a computer without the use of any actual children to create the images.[61] The statute which bans such child pornography defines its subject as "a digital image, computer image, or computer-generated image that is, *or is indistinguishable from*, that of a minor engaging in sexually explicit conduct."[62] Thus, as amended, the statute would apply to a crime which only poses a prospective or indirect threat to children.

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[59] *See* 18 U.S.C. § 2251 (2000) (Congressional Findings 3-4). That statute's ban on virtual child pornography was struck down by the Supreme Court in 2002, in part because the direct threat to children in the production of this type of pornography was not provable. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256-58 (2002).

[60] U.S. SENTENCING GUIDELINES MANUAL § 2G2.1(a) (2003).

[61] The drafters of the Feeney Amendment challenge the idea that virtual child pornography can be easily produced. PROTECT Act, *supra* note 15, § 501(11). However, no less a figure than Senator Orrin Hatch has testified to the contrary, saying, "[t]oday, visual depictions of children engaging in any imaginable form of sexual conduct can be produced entirely by computer without using even the actual children. . . . [T]he computer equipment and expertise required to produce such high-tech kiddie porn is readily available to any individual." *Child Pornography Prevention Act of 1995, Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 1-2 (1996) (statement of Orrin Hatch, Chairman, Senate Comm. on the Judiciary).

[62] 18 U.S.C. § 2256(8)(B) (2000), *amended by* the PROTECT Act, *supra* note

The corresponding Guideline applying to this statute's[63] bar on virtual child pornography, section 2G2.2, is thus the proper vehicle for comparison with other statutes and Guideline sections because it is so narrowly focused on the threat examined here, as there is no direct underlying harm to a minor if there is, in fact, no child used in the production of the images.[64]

Notably, the legality of these provisions are now in flux: The Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[65] in 2002 struck down the Child Pornography Act of 1996's ban on "virtual" child pornography produced without using actual children, but the PROTECT Act attempted to reword that statute to make it legal,[66] an attempt which may or may not pass Constitutional muster. Setting that issue aside and looking at the Guidelines which would apply if and when the revised underlying statute is found constitutional, the Guideline ranges established for such offenses repeat the theme we have seen in other areas—that the Guidelines often deal more harshly with an action which poses an indirect threat than they do with the act which would constitute the fulfillment of that indirect threat.

In this instance, that means that the Guidelines establish a harsher penalty for trafficking in virtual child pornography produced without the use of children (but indirectly posing the threat of harm to children) than they do for some *actual sexual abuse* of children by adults. For example, a defendant with no criminal history who traded just one piece of virtual child por-

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15, § 502(a)(1).

[63] 18 U.S.C. § 2256 (2000).

[64] As the Congressional findings contained in the PROTECT Act reflect, prosecutors have been challenged by defendants who leave the government to its proofs as to whether an image is "virtual" or was produced using actual children. 18 U.S.C. § 2256(8)(B) (2000), *amended by* the PROTECT Act, *supra* note 15, § 501(10). This, of course, does not distinguish child pornography from any other part of the law, where the burden of proving each element of a case beyond a reasonable doubt lies with the government.

[65] 535 U.S. 234 (2002).

[66] PROTECT Act, *supra* note 15, § 502.

nography over the internet would face a guideline range of at least fifty-one to sixty-three months after trial.[67] However, the man with the same lack of criminal history and with no aggravating factors who has sex with an *actual* thirteen-year-old girl will receive a sentence of twenty-seven to thirty-five months after trial.[68] Thus, the "virtual" pornographer poses a threat which may or may not be realized, yet receives twice the sentence of the man who actually rapes a child.

Could there be a more backwards result? By any standard, it makes no sense to punish much more harshly the man who sent off the shadowy image of an imaginary person than the man who, in a schoolyard, dark basement, or a bedroom filled with stuffed animals, rapes a seventh-grade girl.[69]

B. Bulk Cash Smuggling and Theft and Fraud

Though it is entirely legal to carry as much cash as one wants into and out of the United States, any international transportation of an amount over $10,000 must be reported to the Department of the Treasury.[70] An unintentional target of this law, of course, are otherwise innocent foreign nationals who are from countries where theft at the borders, even by government officials, is common.

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[67] U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2, 5A (2003). The offense level would be at least twenty-four: a base offense level of seventeen under section 2G2.2(a), a five-point enhancement for trading material under section 2G2.2(b)(2)(B), and a two-point enhancement for using a computer under section 2G2.2(b)(5). *Id.* This calculation does not include a two-point enhancement for a portrayal of a child under twelve under section 2G2.2(b)(1). *Id.*

[68] *Id.* §§ 2A3.2, 5A (2003). The base offense level is twenty-four, but is decreased by six points pursuant to § 2A3.2(b)(4). *Id.* The sexual abuse of such a minor in the special maritime and territorial jurisdiction of the United States would be prosecuted under 18 U.S.C. § 2243(a). *Id.*

[69] Notably, Congress's unyielding attention to internet crimes has turned attention away from the difficult racial aspects of federal sex cases. About seventy percent of federal defendants prosecuted for aggravated sexual abuse, statutory rape and abusive sexual contact are Native American. John V. Butcher, *Federal Courts and the Native American Sex Offender*, 13 FED. SENTENCING REP. 85 (2000). Many Native Americans believe they are unjustly treated by the federal system, where the sentences, light as they are compared to internet pornography, are harsher than those imposed by their home states. *Id.* at 85-87.

[70] 31 U.S.C. § 5316(b) (2000).

The purpose of sentencing such offenders, of course, is based on the possibility that these large amounts of money may be the product of crime and that the unregulated flow of money can possibly facilitate crime. This purpose is expressly reflected in the Guideline section which applies to such conduct, which ties the sentence for such acts to that for theft, property destruction and fraud.[71] Thus, this otherwise lawful activity is circumscribed because of the threat that it may support or encourage theft or fraud.[72] So, again we ask which is more harshly punished, the indirect threat, or the underlying harm? And, once again, the answer is that the action which poses a potential for harm is more harshly punished than the anticipated harm itself.

Again, let us consider two defendants—one who commits the crime which merely threatens real harm, and a second who directly causes that same real harm. Were an individual to simply steal $125,000 from the government (again, assuming no criminal history),[73] the punishment for that crime would be twenty-one to twenty-seven months.[74]

Now let us consider the defendant who poses only a *threat* of that same underlying harm. For him, the punishment for simply carrying the same amount of money ($125,000) out of the country without reporting it[75] (even in the *absence* of any showing that the money was the proceeds of, or furthered, any illegal activity),[76] would be twenty-seven to thirty-three months—two levels above that prescribed for the convicted thief of the same amount.[77] Again, the cart is before the horse, and the activity which threatens harm is more harshly dealt with than the activity which constitutes this anticipated harm.[78] Significantly, unlike the other examples described here, the activity which is deemed a threat (carrying money) is innocent on its face, but for the fact that it has been regulated solely due to that supposedly greater threat of supporting an underlying crime.

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[71] U.S. SENTENCING GUIDELINES MANUAL § 2S1.3(a)(2) (2003).

[72] Because property destruction is rarely a profit-making enterprise, it is ignored here.

[73] Theft from the government is made illegal by 18 U.S.C. § 641, which provides for a statutory maximum sentence of ten years.

[74] U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, 5A (2003). The offense level is sixteen—six as a base level under section 2B1.1(a)(2) (since the statutory maximum is under twenty years), plus ten points for the amount taken, pursuant to section 2B1.1(b)(1)(F). *Id.*

[75] The reporting of money over $10,000 taken into or out of the country is required by 31 U.S.C. § 5316.

[76] Or, notably, the absence of any showing that the funds were the proceeds of *lawful* activity, as such a showing would result in a six-level decrease under section 2S1.3(b)(3). In other words, if there is no showing, or an indeterminate showing, as to the source of the money, there is no adjustment to the guideline score. The burden is on the defendant to show a lawful source of the funds.

C. *Fraudulent Documents and Immigration*

Guideline section 2L2.2 prescribes punishment for those who traffic specifically in false nationalization and citizenship documents. The threat addressed is clear: Such documents can be used by illegal immigrants to enter or stay in the United States.[79] A secondary threat is also addressed: Such documents could be used by those committing other types of crimes, for example, to flee custody. This secondary concern, however, is addressed in a specific four-point enhancement which directly addresses that threat.[80]

Again, the public value found in the other guidelines is revealed yet again if we compare the sentence for behavior which merely threatens a societal harm with that which actually constitutes the harm with which the laws are concerned. Here, that requires a comparison of the potential sentence for producing false documents which may result in illegal immigration with the penalty for illegal immigration itself.

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[77] U.S. SENTENCING GUIDELINES MANUAL §§ 2S1.3, 5A (2003).

[78] Somewhat, though not completely, similar in operation to the structuring rules are the guidelines for money laundering when compared with an underlying act. *Id.* Pursuant to Guidelines section 2S1.1, the sentence for money laundering is calculated by starting with the punishment for the underlying act, then adding at least one or two offense level points based on which money laundering statute was used. *Id.* § 2S1.1(b)(2)(A), (B). One functional difference, of course, is that the money laundering statutes, unlike the structuring law, requires that the money be connected to illegal activity. 18 U.S.C. §§ 1956, 1957 (2000). Nonetheless, as elsewhere, this results in a subsidiary crime being punished more harshly than the underlying crime which is the true issue of concern from a crime control point of view. U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2003).

[79] The fact that the primary threat addressed by this Guideline is immigration fraud is made clear by the bare fact that the Guideline, which could be applied to any type of underlying crime, was placed in the section relating to immigration offenses. *Id.* § 2L2.1.

[80] *Id.* § 2L2.1(b)(3) ("If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of immigration laws, increase by 4 levels.").

Naturally, someone who produces many false documents is going to encourage much more harm in terms of illegal immigration than an individual who produces only one or two.[81] However, the guideline for this offense controls for that, providing for enhanced penalties for multiple documents.[82] Given that multiple harms are accounted for, consider the person who manufactures one false document by altering and selling her own document to an acquaintance, who then enters the United States using the document. Assuming no criminal history[83] and that both individuals go to trial, the woman who produces just the one document in this manner will face a sentence of eight to fourteen months,[84] while the person who illegally enters the country, actualizing the threat posed by the otherwise harmless document, will receive only zero to six months.[85] In other words, the person who makes the illegal entry possible, but not actual, faces about a year in prison, while the person who fulfills the danger may get probation[86] and spend no time in jail.[87] Again, if it is the reality that we seek to prevent, it would make sense to most harshly punish the realization of that possibility—in this instance, an illegal alien in this country, not just an illegal document.

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[81] Assuming that each document will be used by one individual. This assumption avoids both extremes—that each document will be used several times, and on the other hand, that each individual uses multiple documents.

[82] U.S. SENTENCING GUIDELINES MANUAL § 2L2.1(b)(2) (2003). This assumes that the defendant sold the document for a profit.

[83] Criminal history would increase sentences in this instance in two ways: First, it would increase the criminal history category under sections 4A1.1 and 4A1.2. Second, as to the immigrant, the offense level score would be greatly increased if the immigrant had previously been deported following a conviction in the United States under section 2L1.2(b).

[84] *Id.* §§ 2L2.1, 5A.

[85] *Id.* §§ 2L1.2, 5A. This defendant could also be sentenced for "fraudulently acquiring documents" under section 2L2.2, but the penalty would be the same, with an offense level of eight and a sentencing range of zero to six months. *Id.* Notably, the Sentencing Commission has proposed amending § 2L2.2 in order to increase the base range to an offense level of twelve where the document is a United States passport. United States Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines*, (Jan. 13, 2004), *available at* http://www.ussc.gov/2004gvid/rfJan04.pdf.

[86] Probation without home confinement or other such restrictions is available

Consistent in many respects with this outcome is the anomaly within the Guidelines that the person who aids and abets an illegal alien, short of being an actual smuggler, faces a stiffer sentence than the actual alien. For example, if a minister hides an alien in her church, or if an employer shields a domestic worker, those individuals (again, assuming no criminal history and conviction at trial) would face a sentence of four to ten months,[88] while the immigrant would face the zero to six month sentence set out above.[89] Sham marriages[90] receive similar treatment—the woman who marries an alien receives a base offense level of eleven,[91] while the man who then stays in the country because of the sham marriage receives a base offense level of only eight.[92] So, again, the one who makes a wrongful act possible pays a higher price than the one who fulfills that act and gets the benefit that comes with the crime.[93]

And what of the secondary concern—that fake documents can be used by fugitives from the law? Even here, where the

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to those who are in a sentencing range of zero to six months, but not those in the range of four to ten months. U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.1(a)(1), 5A (2003).

[87] Of course, the illegal immigrant will also face the prospect of deportation.

[88] U.S. SENTENCING GUIDELINES MANUAL §§ 2L1.1(b)(1), 5A (2003). The base offense level is twelve under section 2L1.1(a)(2), with a three point deduction if the harboring is not for profit. *Id.* 2L1.1(b)(1).

[89] *Id.* §§ 2L1.2(a), 5E.

[90] That is, those which are primarily for immigration purposes.

[91] U.S. SENTENCING GUIDELINES MANUAL § 2L2.1(a) (2003).

[92] *Id.* § 2L2.2(a).

[93] The rule on harboring aliens runs counter to the Guidelines' approach to harboring fugitives from justice. *Id.* The harboring of a fugitive would most likely be prosecuted as an accessory after the fact under 18 U.S.C. § 3, which states "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." *Id.* Guidelines section 2x3.1(a)(1) sets out that the offense level for such an action is "6 levels lower than the offense level for the underlying offense." *Id.* Thus, harboring a fugitive is treated very differently than harboring an alien. *Id.*

harm is the evasion of justice, we find nearly the same result. As described above, the woman who produces just the one document will face a sentence of eight to fourteen months, assuming a criminal history category of I and a conviction after trial.[94] And the man who then uses that document to escape from custody? He, in turn, would likely face only a two-point offense-level enhancement to the original sentence for obstruction of justice.[95] This would result in a guideline range which will overlap with the unadjusted range—meaning that he could get the same sentence with or without the escape.[96]

D. Firearms Possession and Use

One of the most wide-ranging federal laws is section 922(g) of the United States Code,[97] which criminalizes the possession of firearms by a wide variety of people,[98] including not only convicted felons,[99] but those who use narcotics,[100] those who in the past have been committed to mental institutions,[101] those who have been dishonorably discharged from the armed forces,[102] and even those who are legally in the United States on a non-immigrant visa.[103] The punishment for this offense (established by the Guidelines, of course) is generally harsh,[104] and in many cases harsher than the terms provided for those who actually use a gun as part of a crime.

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[94] *Id.* §§ 2L2.1(a), 5A.

[95] *Id.* § 3C1.1. Even if separately prosecuted, he would receive only a sentence of eight to fourteen months. *Id.* §§ 2J1.6(a)(1), 5A. Meanwhile, the person selling the document would receive a sentence of eighteen to twenty-four months, if they knew the document would be used for that purpose. *Id.* §§ 2L2.1(b)(3), 5A.

[96] *Id.* § 5A.

[97] *See* 18 U.S.C. § 922(g) (2000). Commonly known as the "felon in possession" law, this description inadequately describes its breadth.

[98] 18 U.S.C. § 922(g) requires that the firearm be possessed "in or affecting commerce." However, this element is easily shown merely by demonstrating that the firearm was manufactured in a different state than where the illegal possession occurred, or at some previous time traveled in interstate commerce. Scarborough v. United States, 431 U.S. 563, 566 (1977).

[99] 18 U.S.C. § 922(g)(1) (1994).

[100] 18 U.S.C. § 922(g)(3) (1994). This statute has been held to apply not just to those addicted to narcotics, but to users who are not addicted. United States v. Bennett, 329 F.3d 769, 776 (10th Cir. 2003).

[101] 18 U.S.C. § 922(g)(4) (1994).

[102] 18 U.S.C. § 922(g)(6) (1994). Of course, the exercise of discretion by prosecutors and investigators is usually going to result in the more threatening of these archetypes, especially convicted felons, being prosecuted, rather than the more vaguely defined archetypes, such as drug users.

For example, compare two men who are arrested in possession of a pistol. In the first example, a first-time offender assaults a pedestrian by brandishing and threatening to use a gun.[105] Despite having used the gun in the course of the crime, he will receive a sentence (after trial) of zero to six months of incarceration.[106] With that in mind, consider our second example: A similarly-situated dishonorably discharged veteran found possessing a revolver in his car, who had not used the gun in any type of crime. While the first man (who committed an assault) could emerge with probation,[107] the guidelines would dictate a sentence of fifteen to twenty-one months for the veteran.[108] So, the person who possesses a gun receives three times as long a sentence[109] as the person who utilized the same gun in committing an assault by threat. In short, we penalize the gun possessor more harshly because of his prior actions—that is, his status as a dishonorably discharged veteran. This status is significant because it is seen as increasing the threat that individual poses, therefore requiring a stronger deterrent. At some level, that makes sense, as a way of deterring people from having guns. What does not make sense is advancing this theory while losing sight of the true goal, reducing and punishing actual violence, and allowing the sentence for having a gun be greater than that for using a gun.

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[103] 18 U.S.C. § 922(g)(5)(B) (1994).

[104] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(1) (2003) sets out base offense levels as high as twenty-six for this offense, depending on prior criminal history and the type of weapon possessed.

[105] The definition of a "minor assault" specifically includes assault by threat, where "a dangerous weapon (including a firearm) was possessed and it use was threatened . . . ." *Id.* § 2A2.3(a)(1).

[106] *Id.* §§ 2A2.3, 5A.

[107] While it is true that he first man, who committed assault, could get a longer sentence if the prosecutor *chooses* to also charge him under 18 U.S.C. § 924(c)(1)(A) (which may apply if the defendant brandished the weapon "during and in relation to" a crime of violence), prosecutors often choose not to file such an additional charge, particularly where pleas are negotiated.

[108] The assault with a firearm would have an offense level of six under Guideline § 2A2.3(a)(1), while the firearm possession would have an offense level of fourteen under Guideline § 2K2.1(a)(6). U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.3, 2K2.1 (2003). Were the veteran to prove that he had the gun "solely for lawful sporting purposes or collection," he could have the offense level capped at six pursuant to § 2K2.1(b)(2), but even this break would only make his sentence equal to that for assault with a firearm. *Id.*

[109] This comparison illustrates sentences judged by the top of the range. A bottom of the range comparison is rendered useless by the zero months at the bottom of the first range.

Some might argue that the tough punishments for gun possession based on perceived threat addresses potential harms greater than a relatively minor assault—that is, that such at-risk individuals pose the threat not only of such assaults, but of shooting and killing people with firearms.[110] And, indeed, the Guidelines reserve their highest ranges of all for those who kill, especially in connection with narcotics trafficking.[111] However, even in those cases where a firearm is used to shoot and even kill someone, the punishment for simply possessing the gun as a perceived dangerous person may be greater than that for committing the knowing act of killing a person.

For example, consider the situation where a man has six prior convictions for selling marijuana, then commits manslaughter with a gun in a bar fight. Incredibly, even taking into consideration the byzantine Guideline provisions regarding heightened sentences for "career offenders,"[112] the sentencing range for this defendant for merely possessing the firearm is going to be much higher than the punishment for killing. 18 U.S.C. § 1112(b) limits the punishment for manslaughter itself at ten years (120 months);[113] however, the Guidelines would establish a 235-293 month sentence[114] for merely possessing the firearm[115]—a sentence twice as long, despite the fact that this punishment is for an act in which no one was hurt.[116] Notably, even if the killing was classified as a second-degree murder, the punishment would only be equal to that mandated for simple possession of the firearm.[117]

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[110] Others may correctly point out that most assaults are prosecuted in state court. However, this article is meant to address the internal logic of the Guidelines themselves and thus will not address state sentencing practices.

[111] For example, the Guidelines allow a base offense level of up to forty-three points for those who kill in the course of certain narcotics offenses, resulting in an automatic punishment of life imprisonment (provided that the death penalty is not sought in the case). U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(a)(1), 5A (2003).

[112] *Id.* § 4B1.1(a)-(b).

[113] If the prosecutor elects to add a separate charge pursuant to 18 U.S.C. § 924(i)(2)(i)(2), ten years would be added to the sentence. *Id.* However, that would result in a sentence (240 months) towards the bottom of the range that would apply to the gun possession crime described. *Id.*

The high guidelines applying to 18 U.S.C. § 922(g),[118] relative to the statutory maximums and guideline ranges for assault,[119] manslaughter[120] and second degree murder,[121] send a bizarre message—that the threat of a gun in the hands of a person deemed dangerous by some prior status is subject to equal or higher punishment than those who take that same gun and use it in a violent crime.

E. Narcotics and Related Crimes

In 1989, about the time many of the current drug laws were formulated,[122] fifty-eight percent of Americans surveyed named drugs as the single factor *most* to blame for crime generally.[123] Congress reacted to this concern, and the media reports on the crack epidemic,[124] by passing tough new drug laws[125] which were in large part predicated on the idea that narcotics use and sale indirectly causes other crimes, including violent crimes.[126]

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[114] A fifteen-year mandatory minimum applies in such a case, voiding the usual statutory maximum. 18 U.S.C. § 924(e)(1) (1994).

[115] U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.4(c)(2), 4B1.1(a), 5A (2003). This assumes a criminal history category of VI, which would be consistent with the person described. *Id.*

[116] *See, e.g.*, United States v. Carnes, 309 F.3d 950, 954-56 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 1371 (2003).

[117] Assuming the highest criminal history category of VI under both calculations. U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.2(a), 5A (2003).

[118] *Id.* § 2K2.1.

[119] *Id.* § 2A2.3.

[120] *Id.* § 2A1.3.

[121] *Id.* § 2A1.2.

[122] These laws include the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2033.

[123] BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM 93 (1992).

[124] David A. Sklansky, *Cocaine, Race and, Equal Protection,* 47 STAN. L. REV. 1283, 1291 n.37, 1293 n.49 (1995).

[125] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2033.

That conclusion is not disputed here. That low-level transactions for narcotics indirectly may create the conditions for violent crimes, including murder, robbery and kidnapping, is accepted for purposes of the discussion here. The question of whether or not such a link exists is not the focus of this article.

Rather, the examination here is whether low-level drug trafficking is punished more or less harshly than the directly destructive violent crimes which may be enabled, in part, by these transactions. The answer, consistent with the conclusions elsewhere in this article, is that in many cases the less serious crime which threatens a larger harm is punished more seriously than that larger harm itself under the federal Sentencing Guidelines.

Another aspect of the narcotics guidelines also merits examination. As discussed in sub-section two below, the penalty under the guidelines for possessing precursor chemicals which are to be made into narcotics is at times harsher than the penalty for actually manufacturing the same amount of narcotics. This is in keeping with the larger argument made here, as the precursor chemicals, such as pseudoephedrine, are often legally sold and only pose the threat (albeit, a fairly direct threat) of being made into an illegal substance, rather than being harmful in themselves.

1. Narcotics and Violent Crime

As set out above, this article starts with the assumption that narcotics transactions are a causal factor for violent crime.[127] From this assumption, it is easy enough to move to comparison—in this case, by comparing the Guideline sentences for the low-level narcotic transactions which pose the threat of violence, and the sentence ranges for those who actually commit acts of violence.

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[126] *See supra* note 8 (noting that Senator Hawkins quoted an article on crack and crime).

[127] This causation is easy to assume but hard to quantify. It would include narcotics addicts who commit crimes while using the drug, and the violence that may come with disputes over the narcotics trade itself.

Crack and methamphetamine are two controlled substances often serving as the basis of prosecution in federal courts.[128] Below, the sentence for a small sale of each is compared with violent crimes—robbery and manslaughter. In each instance, a criminal history category of II and conviction after trial is assumed for each offender.[129] And, in each case, the sentence for narcotics distribution, even in small amounts, is significantly more than for the violent offense which has ended or enduringly altered a life.

First, consider the defendant who is convicted of possessing with the intent to distribute twenty-five grams of crack cocaine (which is identified in the Guidelines as "cocaine base").[130] Even in the absence of aggravating factors such as the possession of a weapon[131] or being labeled a leader or organizer of a conspiracy,[132] the defendant would face a guideline range of 87-108 months after trial.[133] Assuming that such trafficking creates violent crime, compare this sentence with one such violent crime—armed robbery. The man who uses a gun to rob a convenience store on federal or Indian land,[134] for example, may receive a sentence of only thirty-seven to forty-six months,[135] less than half that faced by the crack seller.[136] Even if he stabs someone during the robbery[137] or discharges a firearm in the store,[138] the robber would have less exposure to prison under the guidelines than the relatively small-time drug dealer.[139]

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[128] In 2001, for example, narcotics accounted for 41.2% of federal cases. Of those, 20.4% were crack cocaine cases, and 14.2% involved methamphetamine. United States Sentencing Commission, *Federal Sentencing Statistics by State, District, and Circuit*, Figure A (Distribution of Sentenced Guideline Offenders By Select Primary Offense Category, Fiscal Year 2001), *available at* www.ussc.gov/JUDPACK/2001/2C01.pdf (last modified Aug. 28, 2002).

[129] Criminal history category II is assumed rather than category I in order to avoid the uncertainties created by the federal "safety valve," which reduces an offense level by two points for some, but not all, of those defendants who fall in criminal history category I, in conjunction with U.S. SENTENCING GUIDELINES MANUAL §§ 5C1.2, 2D1.1(b)(6) (2003). Beyond the requirement that the defendant be in criminal history category I, the Guidelines also require that the defendant provide an affirmative statement of responsibility to the government, even if he contests his guilt. *Id.* § 5C1.2(a)(5). Even if the safety valve did apply, however, in most of the cases discussed here, the narcotics crime would still be more seriously punished than the violent crime.

[130] *Id.* § 2D1.1, notes to Drug Quantity Table (D).

[131] *Id.* § 2D1.1(b)(1).

[132] *Id.* § 3B1.1.

[133] Based on an offense score of twenty-eight and assuming a criminal history category of II. *Id.* §§ 2D1.1(c)(7), 5A.

[134] This was made a federal crime under 18 U.S.C. § 1153. Because many violent and sex crimes in the federal system occur on Indian reservations (due to

The methamphetamine manufacturer is likely to face a similar fate. Methamphetamine is now often made by individuals and small groups.[140] As with crack, users of the drug are often deeply harmed by the drug use,[141] and violent crime may be committed by either users or manufacturers of the drug in connection with their methamphetamine use.[142] Also com-

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their being one of the few areas of federal jurisdiction for such crimes), complex issues arise regarding the federalization of crimes largely occurring in areas expressly defined by ethnicity. *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563 (2002).

[135] U.S. SENTENCING GUIDELINES MANUAL §§ 2B3.1(a), 5A (2003).

[136] This assumes that the defendant was not separately charged for the use of the firearm under 18 U.S.C. § 924(c), which provides for a separate and consecutive five-year sentence. However, if that statute is used, the seven-point enhancement for discharge of the firearm is not included. U.S. SENTENCING GUIDELINES MANUAL § 2K2.3, cmt. (n.4) (2003). If the additional charge is entered and the sentence is calculated this way, the resulting range is still only 97-121 months, which is roughly equivalent to that given the small-time crack seller. *Id.* §§ 2B3.1, 2K2.3, 5A.

[137] If he uses a knife to stab someone, the twenty point base offense level will be enhanced by four points for use of a weapon under section 2B3.1(b)(2)(D), and another two points for bodily injury under section 2B3.1(b)(3)(A). The resulting twenty-six point offense level, combined with the assumed criminal history category of II, would result in a sentence range of seventy to eighty-seven months. *Id.* § 5A.

[138] Discharge of the firearm would increase the offense level by seven points, to twenty-seven, under section 2B3.1(b)(2)(A), resulting in a sentence of seventy-eight to ninety-seven months (again, assuming a criminal history category of II). *Id.* § 5A.

[139] Again, this assumes that the prosecutor has not elected to separately charge the use of the firearm under 18 U.S.C. § 924(c). *See supra* note 127.

[140] Koch Crime Institute, *Methamphetamine*, *at* www.kci.org/meth_info/faq_meth.htm (n.d.) [hereinafter *Koch*]. These small labs supplement supplies from larger operations in California and Mexico. Drug Enforcement Administration, *Methamphetamine and Amphetamine Fact Sheet*, *at* www.dea.gov/concern/meth_factsheet.html (n.d.) [hereinafter *Fact Sheet*].

[141] Methamphetamines can cause psychotic behavior and brain damage. *Fact Sheet*, *supra* note 140, *available at* www.dea.gov/concern/meth_factsheet.html.

[142] In addition, methamphetamine manufacture itself can pose environmental

mon as an incident to methamphetamine manufacture is the theft of materials used in the manufacturing process, such as pseudoephedrine or anhydrous ammonia.[143]

Methamphetamine may be manufactured in one to two ounce batches,[144] which equates to 28.35 grams to 56.70 grams.[145] Of course, most people manufacture more than one batch, meaning that a prosecutor may easily have proof of hundreds of grams produced by a relatively small operation in a home. To be conservative, however, for the following comparison, we will consider a prosecution for manufacture of sixty grams of methamphetamine, or less than three ounces. Without aggravating factors such as environmental damage[146] or danger to others posed by the manufacturing process,[147] the sentence after trial for this small operator with no criminal history will be seventy to eighty-seven months.[148]

Because methamphetamine is known to cause violent behavior and "mood disturbances,"[149] it is fair to compare this crime with the classic crime of passion, manslaughter. Even at criminal history category II, the punishment for manslaughter is sixty-three to seventy-eight months,[150] one notch lower in the Guidelines grid than that for the methamphetamine manufacturer.

So, do we really believe, as a public value in a democratic society, that the sale of narcotics, even in small amounts, is

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dangers and the danger of explosion, threats which are specifically addressed through enhancements in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(5)(A), (B).

[143] *Fact Sheet*, *supra* note 140, *available at* www.dea.gov/concern/meth_factsheet.html; *Koch*, *supra* note 140, *available at* www.kci.org/meth_info/faq_meth.htm.

[144] Case documents on file with the author, including a recipe for making one to two ounces of methamphetamine.

[145] The Guidelines themselves provide a conversion rate between ounces and grams, as the amounts are usually described on the street in terms of ounces, and are described in the Guidelines in grams. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. (n.10) (measurement conversion table) (2003).

[146] *Id.* § 2D1.1(b)(5)(A).

[147] *Id.* § 2D1.1(b)(5)(B).

[148] *Id.* §§ 2D1.1(c)(7)), 5A.

[149] *Fact Sheet*, *supra* note 140, *available at* www.dea.gov/concern/meth_factsheet.html.

[150] U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.3, 5A (2003).

more dangerous than intentionally killing someone? The United States Sentencing Guidelines say that we often do,[151] consistent with the way indirect threats are dealt with elsewhere in the Guidelines.

2. Narcotics and Precursor Chemicals

In recent years, one method to attack drug manufacture has been to criminalize the accumulation of precursor chemicals which are used to make narcotics like methamphetamine. In the case of pseudoephedrine, these precursors are sold as over-the-counter medications.[152] Just as an otherwise-legal cash transfer out of the country may or may not be used to support crime, pseudoephedrine, an over-the-counter cold remedy sometimes sold under the brand name of Sudafed, may be legally bought and sold.

Under the Guidelines, one gram of pseudoephedrine possessed for intended use in making methamphetamine[153] is sentenced as the equivalent of ten kilograms of marijuana.[154] However, a gram of impure, processed methamphetamine itself is sentenced as the equivalent of just *two* kilograms of marijuana,[155] meaning that the legal precursor is treated five times as harshly as the exact same weight of finished methamphetamine.

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[151] Some state laws are just as harsh. As Susan Herman has noted in pointing out similar results under New York law, that state treats the sale of two ounces of heroin as the equivalent of first-degree murder. Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws,* 63 ALB. L. REV. 777, 782 (2000).

[152] Other components for methamphetamine may include starter fluid and lithium strips from alkaline batteries, both of which are commercially available. Press Release, Macoupin County, Illinois, Cooperative Investigation Targets Methamphetamine in Macoupin County: Six Charged in Federal Complaints (Apr. 24, 2003), *available at* http://www.usdoj.gov/usao/ilc/press/2003/april/042403macoupinmeth.html.

[153] 21 U.S.C. § 841(c)(2) makes illegal the knowing and intentional possession of "a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance . . . ."

[154] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. (n.10) (tables) (2003).

[155] The Guidelines direct that some sentences be calculated by first translating a drug amount to a "marijuana equivalency," then using the guideline range which would apply to that amount of marijuana. *Id.*

Tracking the effect of this counter-intuitive result is relatively simple. The defendant who manufactures eight grams of methamphetamine will (at criminal history category II) receive twenty-four to thirty months incarceration,[156] while the defendant who is caught with the same eight grams of pseudoephedrine will receive a sentence of fifty-seven to seventy-one months.[157]

Part of the confusion here is caused by the Guidelines' somewhat odd differentiation between "actual methamphetamine" and "methamphetamine."[158] A Note to the Drug Quantity Table explains that "actual methamphetamine" is the pure methamphetamine which comprises part of the mixture sold as a narcotic, and that the sentence is determined by the higher of the offense level for "actual methamphetamine" (that is, the portion of the drug which is pure) or the mixture as a whole.[159] The guideline provisions apportioning offense level assumes that methamphetamine as sold is about ten percent pure, in that it establishes penalties for actual and finished methamphetamine at ten-to-one.[160] Note that only a portion of that ten percent, in turn, would be composed of pseudoephedrine. Thus, it would make sense that the penalty for a given amount of pseudoephedrine should be something less than ten percent of the penalty for a finished mixture of methamphetamine.

However, in 2001, the Sentencing Commission adopted an Emergency Amendment in response to a directive from Congress, tying the offense level for pseudoephedrine to that of methamphetamine by assuming a fifty percent yield of *actual* methamphetamine from a given batch of pseudoephedrine.[161]

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[156] The offense level for eight grams of pseudoephedrine is twenty-four. The range calculated above reflects no adjustment for acceptance of responsibility. *Id.* §§ 2D1.11(d)(8), 5A.

[157] The offense level for eight grams of methamphetamine is sixteen. For purposes of comparison, a criminal history category of II a failure to accept responsibility is also assumed for this defendant. *Id.* §§ 2D1.1(c)(12), 5A.

[158] *See, e.g., id.* § 2D1.1(c)(9) (establishing a base offense level of 22 for 30-40 grams of "methamphetamine" or three to four grams of "actual methamphetamine").

[159] *Id.* § 2D1.1, cmt. (n.B).

[160] *See supra* note 158 and accompanying text.

[161] ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING GUIDELINES HAND-

This created a problem in that it failed to take into consideration the assumption built into the narcotics guideline, described above—that regular methamphetamine, as sold and used, is about ten percent pure. The result of this discrepancy is that the penalty for the precursor is much harsher than that for the finished product. The upside-down result, of course, is that the addict who is supplying the maker with one component, perhaps in exchange for a fraction of the finished product, is going to get a lengthier sentence than the maker himself. As described above, the addict supplying eight grams of pseudoephedrine to a lab is going to face a potential sentence of seventy-one months, while the maker of eight grams of finished, ready-for-use methamphetamine faces a maximum sentence of only thirty months. What is unclear is how this is supposed to achieve any goal of sentencing or criminal law.

IV. POSSIBLE RATIONALES FOR THE PUNISHMENT OF INDIRECT THREATS

As set out above, the Guidelines often more harshly punish actions which can *lead* to more serious harm than they do actions which *directly cause* that more serious harm itself. The possibility exists, of course, that there may be larger social justice issues which could justify these odd results. Two possible arguments for the current trend seem most feasible. First, there is not a one-to-one correlation between predicate crime (i.e., fraudulent document production) and the resulting substantive crime (illegal immigration), and that, rather, there is a multiplier effect for each crime which makes other crimes possible—in other words, one predicate crime makes several resulting crimes possible.

Second, it could be that the predicate crime is not being punished solely because it may produce other crime, but as a moral wrong in itself. As discussed below, the current Guidelines scheme supports neither of these arguments, and instead undermines the mandate of proportionality between act and resulting sentence which was given to the Sentencing Commis-

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BOOK 599 (Nov. 2003 ed.).

sion at the outset of its task.[162]

A. The Problem of the Multiplier

It certainly may be true that some of the "indirect threat" crimes discussed here may cause more than one resulting crime. For example, ten grams of crack may be made into several "rocks" of crack cocaine, each appropriate for a single use,[163] resulting in several episodes where the user may be more prone to violent crime. It might be that even this tiny amount of crack[164] can cause wide damage. However, this multiplier (if and where it exists) does not appear to have been measured,[165] is already accounted for in the Guidelines themselves,[166] and at any rate, the Guidelines are inconsistent in their treatment of a multiplier, ignoring the multiplier effect altogether in dealing with its clearest application in cases involving the fencing of stolen goods.

The multiplier effect is not as clear for the other types of crimes listed above as it is for narcotics. For example, bulk cash smuggling is unlikely to relate to multiple patterns of theft or fraud,[167] and the Guidelines account for any such increase by calibrating the punishment to the amount of money undeclared.[168] The same can be said of illegal gun possession. By its nature, the harm threatened is usually limited to the prohibited individual himself. Beyond such comparisons, there seems to be little hard data supporting the extent of any such multiplier effect even as to narcotics, meaning we do not know if the effect of those ten grams of crack is likely to be one downstream crime, no crimes, or three crimes.[169] We are guessing, yet basing judgments which lock people up for years on that guess.

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[162] U.S. SENTENCING GUIDELINES MANUAL § 1A1.1(3) (2003).

[163] The Drug Enforcement Administration says that a single-use "rock" of crack cocaine" ranges from one-tenth to one-half of a gram. *Trafficking*, *supra* note 8, *available at* http://www.dea.gov/concern/drug_traffickingp.html.

[164] One gram is the amount of powder in one packet of coffee sweetener.

[165] There is no evidence that any specific study of a multiplier affect has been used in formulating the Federal Sentencing Guidelines.

[166] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2003) (applying amount of loss table to determine offense level for bulk cash smuggling).

[167] It is true that thefts and frauds often can be pattern offenses consisting of more than one discrete victimization, but the crimes within such a pattern are grouped and considered as one crime under the Guidelines. *Compare id.* § 2B1.1, *with id.* § 3D1.2.

[168] U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2003).

In any event, in most instances, there is a control in the Guidelines already for such multiplier effects. For example, the Guideline for illegal firearms possession[170] already includes specific enhancements where multiple guns are possessed[171] and where a gun is transferred or used in connection with another felony offense.[172] Thus, if we are making the sentences for firearms possession higher because that possession threatens further harm, and then specifically enhancing punishment where that threat is realized by someone else, we are doing the same thing twice, and over-punishing the individual whose actions constitute a threat which is not realized. Where the result is rising prison populations and families deprived of a father or mother, such overkill is a serious matter.

A similar analysis applies to child pornography. The Guidelines for the crime[173] of trafficking in virtual child pornography[174] also provides specific enhancements for multiple harms. For example, if the images were used to coerce or induce a minor into prohibited sexual conduct, the offense level rises by seven points,[175] and an increase in sentence is mandated correlating to the increasing retail value of the images.[176] Thus, as with guns, any multiplier effect is likely accounted for twice in the sentencing scheme—once by making the offense level so high for such trading or trafficking, and again through these specific enhancements.

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[169] I do not mean to suggest that such a study is necessary for each crime sentenced, but rather that even the most general studies on the existence of a multiplier do not seem to have been completed. Such a study, of course, may be impossible. The nexus between crimes, for example between crack use and violent crime, is largely untraceable due to its very essence as a part of a shadowy underworld.

[170] *See* discussion *supra* Section III.D.

[171] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(1) (2003). These increases range from two points of offense level for three to seven firearms, and ten points for 200 guns or more. *Id.*

[172] Specifically, the Guidelines establish a floor of offense level eighteen and increase that level by four points where the "defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense . . . ." *Id.* § 2K2.1(b)(5).

[173] That is, prior to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which held that virtual child pornography could not be made illegal. As noted earlier, Congress has now moved to resuscitate the ban on virtual child pornography through amended language. *See* discussion *supra* Section III.A.

[174] *See* discussion *supra* Section III.B.

The story repeats again when we examine the Guideline section for bulk cash smuggling.[177] There, the penalty is specifically correlated to the amount of the transaction,[178] which in turn would correlate to the magnitude of the harm threatened. An analogous situation appears in relation to fraudulent documents and illegal immigration.[179] The guideline for producing or selling fraudulent immigration documents contains a specific enhancement tied to volume,[180] and further includes a four-level enhancement where the defendant "knew, believed, or had reason to believe" that a passport or visa would be used in a felony offense other than an immigration fraud.[181]

Even in the narcotics case, where a multiplier effect may be most legitimately expected, the Guidelines already account to some degree for such downstream harms. Generally, the sentence is going to be adjusted upward incrementally for larger amounts of narcotics,[182] which would be expected to correlate to a larger threat, although that increase presents its own complexities, discussed below.[183] More specifically, the Guidelines mandate precise enhancements where use of the substance resulted in death or serious bodily injury.[184] In the case of amphetamine and methamphetamine, specific enhancements apply where toxic substances are dumped[185] or where the cooking process posses a substantial risk of harm to others.[186] While these specific adjustments do not directly address the possible resulting harms nearly as completely as in the other examples described above, it also must be said that it is less certain in the narcotics context than in others that downstream harms will exist in any given case.[187]

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[175] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2)(D).

[176] *Id.* § 2G2.2(b)(2)(A).

[177] *See* discussion *supra* Section III.B.

[178] U.S. SENTENCING GUIDELINES MANUAL § 2S1.3(a)(2), (c)(1) (2003).

[179] *See* discussion *supra* section III.C.

[180] U.S. SENTENCING GUIDELINES MANUAL § 2L2.1(b)(2) (2003).

[181] *Id.* § 2L2.1(b)(3).

[182] *Id.* § 2D1.1(c).

[183] *See* discussion *supra* Section IV.A.

[184] Specifically, the Guidelines require an offense level of forty-three for some such offenses, which will mandate at least life in prison. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(a)(1), 5A (2003).

If it is the idea of a multiplier which motivates such stiff sentences, we would expect the Guidelines to be informed as a whole by that idea. This is not the case. For example, there is probably no crime with a more obvious "multiplier" factor than that of fencing stolen goods. The multiplier is built into the definition of the crime—a fence, by definition, is building his crime necessarily on the crimes of others.[188] In this area, the link is not indirect at all, but direct—without the fence, there is no market for the thief. Yet, in this area, the fence is sentenced under the same guideline section as the thief,[189] eliminating the mechanism used in narcotics, child pornography, firearms and bulk cash smuggling cases to increase sentences where a multiplier effect might apply.[190]

In addition, the sentencing provisions are set out to begin with a "floor," which is increased as the amount at issue (drug weight or fraud proceeds, for example)[191]increases. Naturally, the amount of increase will correlate to the possible resulting harm, as, for example, more narcotics will presumably be used by more people who could commit further crimes. However, this increase is shockingly uneven; it tends to mandate stiff sentences for small amounts, without an exponential, or even an arithmetic, increase for larger amounts. For example, twenty-five grams of heroin creates a base offense level of eighteen, with a resulting sentence after trial of thirty-three to forty-one months for someone in criminal history category III.[192] Double the amount to fifty grams, correspondingly doubling the risk of downstream crimes, however, and there is no corresponding increase in time of sentence—rather, the new sentence at offense level twenty is just forty-one to fifty-one months,[193] which overlaps with the previous range. Double the figure again, to 100 grams, with a corresponding doubling of risk, and again, the sentence does not double, but instead increases to seventy-eight to ninety-seven months, at level twenty-six.[194] Double it again, to 200 grams, and there is *no change* in the sentence at all.[195] Double it again, to 400 grams, and it barely budges, to just 97-121 months.[196] Double it yet again, to 800 grams, and the sentence again only goes up just one notch, to 121 to 151 months, all other things being equal.[197] In short, increasing the amount of possible harm by thirty-two times only results in an increase in sentence of about four times—not even an equal increase. Obviously, if the multiplier effect is a motive in so harshly punishing narcotics offenses, it is left out of the calculations at the heart of the guideline itself.[198] Rather, the current Guidelines[199] disproportionately punish small-time offenders rather than setting up a more progressive schedule which would create incentives to go after those who control more narcotics and the resulting profit.

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[185] *Id.* § 2D1.1(b)(5)(A).

[186] *Id.* § 2D1.1(b)(5)(B), (C).

[187] This is inherent in the facts. While a forged document almost always will be connected to another crime, many drug users are not violent and many drug transactions probably result in no violent crime by the users or sellers.

[188] The transfer and transport of stolen goods across state lines is criminalized at 18 U.S.C. § 2314.

[189] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(4) (2003).

[190] The receiver of stolen property receives the same sentence as a thief, plus a possible two point enhancement if they are "a person in the business of receiving and selling stolen property." *Id.* § 2B1.1 (b)(4).

[191] *Id.* §§ 2D1.1(c), 2B1.1(b)(1).

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[192] *Id.* §§ 2D1.1(c)(11), 5A.

[193] *Id.* §§ 2D1.1(c)(10), 5A.

[194] *Id.* §§ 2D1.1(c)(7), 5A.

[195] *Id.*

[196] *Id.* §§ 2D1.1(c)(6), 5A.

[197] *Id.* §§ 2D1.1(c)(5), 5A.

[198] Similarly, the table describing increased offense levels for theft/fraud amounts (used, among other places, in sentencing the structuring cases described above) does not increase the sentence proportionally with the increase in threat of underlying harms. *Id.* While a $1,000 loss would result in two to eight month sentence for a Criminal History Category III defendant after trial, increasing that loss (and the resulting risk) to $32,000 only increases the sentence to fifteen to twenty-one months. *Id.* §§ 2B1.1(b)(1), 5A.

[199] The Guidelines punish in conjunction with the statutory minimums set out in 21 U.S.C. § 841.

Meaning, of course, that if the basis for stiff drug sentences is to avoid social harm, there is going to be a direct correlation between the amount of the drug and how much social harm can result. But we have the remedy backwards by providing the criminal-law version of a "volume discount," where those dealing larger amounts are not proportionately punished relative to those selling smaller amounts.[200]

B. Predicate Crimes as Moral Wrongs

The argument could be made that crimes such as bulk cash smuggling, virtual child pornography, gun possession, immigration document fraud and narcotics trafficking are harshly sentenced not because they threaten to propel other crimes, but because they are moral wrongs in themselves deserving such harsh punishment. This notion, when dealing with the harshness of the punishment, is refuted not only by the way these crimes are treated by the legislature and the Sentencing Commission (which reveal an interest in curbing the indirect threat of other "downstream" crimes),[201] but by the nature of those crimes themselves.

To start with the easiest, the type of cash smuggling described in Section III.B above, cannot even be said to constitute a harm other than in connection to other crimes. After all, it is completely legal to carry any amount of money in or out of the country—it is the failure to declare it which is illegal.[202] Furthermore, there is nothing inherently wrong with carrying money from here to there, an act we all commit every day. So, at least in that instance, there is no underlying moral wrong in the act itself.

Firearm possession, similarly, poses a danger only in combination with other acts. The simple act of possession of a firearm, in and of itself, is harmless. Certainly, the Guidelines themselves recognize this by given defendants a considerable break when they can prove the possession related to hunting or collection.[203] Similarly, the production of truly virtual child pornography, while made illegal, does not directly harm children—it is the consumers downstream who may harm children, as the law recognizes.[204] The same applies for passport fraud. The document itself does no harm until another action is taken.

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[200] The "volume discount" for crimes is present elsewhere in the Guidelines, as well. For example, the method of calculating a combined offense level for multiple crimes, such as bank robberies, treat six robberies the same way they would twenty-four similar robberies, despite the fact that there are eighteen more victims. U.S. SENTENCING GUIDELINES MANUAL § 3D1.4 (2003).

[201] *See* discussion *supra* Section II.A-E.

[202] 31 U.S.C. § 5316 (2000).

And what about narcotics? While production or trafficking in narcotics is sometimes a part of the chain of events leading to drug use and resulting violence, the distribution and trafficking do not *directly* produce harm to others without their willing participation.[205] While there are tremendous harms done to a person by drug use,[206] these harms are done by the actions of those individuals in willingly using the drug. The primary danger to innocents, as posited earlier, is from collateral violence which is part of the trade itself, and the risk of violence which may be committed by users.[207] Thus, as to each crime discussed here, it must be the threat of downstream violence which motivates such harsh sentences. Which begs the question: Why punish the act which threatens a harm more harshly than the harm we ultimately fear?

V. THE HARM DONE AND THE REFORMS WE NEED

A. *The Harm Caused by Threat-Based Proportionality*

Throughout the Guidelines, a perverse proportionality is found: The man who makes killing possible is punished more seriously than the man who kills,[208] the woman who makes a single illegal immigration possible is imprisoned while the immigrant is not,[209] and the sender of a lewd image which looks like, but is not, a child, is punished twice as harshly as the child-rapist.[210] This is, like it or not, the current state of our law, laid bare by the stark numbers that make the Guidelines so imposing.

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[203] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(2) (2003).

[204] *See* discussion *supra* Section III.A.

[205] This is not to minimize the damage that people do to themselves through drug use, but rather reflects the fact that those users are most often not unwilling victims of a crime.

[206] The DEA web site includes photographs showing the physical damage wrought by ten years of methamphetamine use. http://www.dea.gov/concern/methuse.jpg.

[207] *See* discussion *supra* Section III.E.

[208] *See* U.S. SENTENCING GUIDELINES MANUAL § 2A1 (2003).

But, if it is true that the federal Guidelines punish an act which threatens harm more harshly than the act which may result, what harm does that do?

The most obvious harm of this backwards regime is to defendants and those who rely on them. Those who discount this factor have not spent enough time in courtrooms, where judges often look out onto the children, parents and friends of defendants as they issue a sentence under the Guidelines, knowing that the addition of fifteen months may mean that while the defendant is in prison a child may be born, a graduation missed and a loved one may die alone.

Some, of course, decry anything that smacks of sympathy for defendants or their families. Setting that aside, there remain costs not associated with defendants and those around them.

One cost is the corruption of one of the principal goals of the Sentencing Guidelines themselves: Proportionality. As the Guidelines themselves recognize, in creating the new sentencing scheme, "Congress sought reasonable proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[211] Given this directive, the results are confounding. In gauging differing severity, the present Guidelines conclude that carrying money is more severe than committing fraud,[212] that holding crack is more severe than manslaughter,[213] that manipulating an image on a computer is more severe than molesting a child,[214] and that possessing a gun may be a more severe crime than using that same gun to commit a violent crime.[215] If this is honest proportionality, then reality is standing on its head.

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[209] *See id.* §§ 2L1.1, 2L1.2.

[210] *See id.* §§ 2G21(a), (b)(1), 2A3.1(a), (b)(2).

[211] *Id.* § 1A.1(3).

[212] *See id.* § 2B1.1.

[213] *See supra* note 9 and accompanying text.

Another cost is the reaction of judges to mandatory directives that run contrary to their principles. For years, scholars have noted that judges are subverting the Guidelines by granting departures, so that the sentences that result will more closely correlate to their own sense of proportionality.[216] After all, it is the same judge who sentences the minor-league drug dealer and the killer, sometimes on the same afternoon. The contrast is not lost on these wise heads, chosen for their judgment and experience.

Most recently, we have seen Congress pass the Feeney Amendment in reaction to a trend of downward departures by judges.[217] In promoting that amendment, its sponsor, Representative Tom Feeney of Florida, said, "[d]epartures are supposed to be rare. But instead a disturbing trend has occurred, especially in child pornography cases."[218] In the wake of Feeney's success, at least one Federal Judge resigned, citing the new restrictions.[219] That judge, John S. Martin of the Southern District of New York, expressed his frustration at the back-and-forth on sentencing between judges and Congress, saying, "[n]obody in Congress wants to let an opponent have a 30-second commercial that says Congressman so-and-so reduced the penalties for selling crack."[220]

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[214] *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.1,2A3.1(a), (b)(2) (2003).

[215] *See id.* §§ 2K2.1, 2A1.

[216] Over a decade ago, Professor Daniel Freed saw that, because of such subversion, an "underground level of sentencing seems to be displacing the first, visible level." Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 (1992); *see also* STITH & CABRANES, *supra* note 28, at 5 ("Ironically, however, disparity—different sentences for defendants whose crimes and criminal histories seem similar—may be as great under the Guidelines as it was under the discretionary system it replaced.").

[217] PROTECT Act, *supra* note 15.

[218] Cahill, *supra* note 53.

[219] Larry Neumeister, *Federal Judge Resigns, Calling Judicial System Unjust*, (June 24, 2003), *at* http://www.ap.org.

[220] *Id.*

The effect of this constant pushing and pulling between judges and Congress is unhealthy—it reduces the certainty of sentencing Congress desires and alienates judges from one of their principal tasks—an alienation that can result in subversion of the Guidelines. By making the Guidelines more rational in terms of proportionality, it could ease this dangerous dynamic; judges would be less likely to depart, which in turn would ease Congress' concerns.

Proportionality can and should be re-evaluated by both Congress and the Sentencing Commission. What follows is a rough sketch of how the problem could be addressed.

B. Reform of the Guidelines to Create Rational Proportionality

1. Towards a Functioning Principal of Proportion

Three steps could easily be taken to make the Guidelines reflect a rational sense of proportionality. First, Congress and the Sentencing Commission should recognize the imbalance that an over-emphasis on indirect threats can cause, and should establish a rational principal by which to peg crimes that create such threats relative to those ultimate harms themselves. Second, that principal should then be applied to the existing Guidelines, where possible. Third, the Guidelines should maintain and even enhance *specific* volume enhancements to address the possible multiplier factor for downstream crimes, rather than raising the Guidelines for "indirect threat" crimes.

As to the operating principal itself, my suggestion is that the offense level for such a crime posing an indirect threat should be no more than two-thirds of the offense level for the commission of the ultimate harm. For example, if stealing $32,000 results in an offense level of twelve,[221] the crime of smuggling that same amount of money out of the country should be no more than eight. This, of course, would leave unaffected those many provisions of the Guidelines which directly boost an offense level where another crime is committed or made possible as a result—for example, the provision in section 2S1.3 which adds two offense levels where a defendant charged with bulk cash smuggling "knew or believed that the funds were the proceeds of unlawful activity, or were intended to promote unlawful activity . . . ."[222] Thus, we would consciously and specifically address possible multiplier factors, rather than skewing the proportionality of the Guidelines as a whole.

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[221] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(2), (b)(1) (2003).

Such a concrete standard would at least result in a more conscious decision-making, as the ultimate harm feared would be used as a benchmark in setting the sentence for the crime which constitutes a threat.

In employing such a standard, the Commission could not only look prospectively at new proposals, but review those guideline sections which currently present the problem. Each is addressed in turn below.

2. Revisions Regarding Virtual Child Pornography

As described above, the current Guidelines could result in a child rapist getting a sentence half as long as that accorded a man who sends a single computer image of "virtual" child pornography.[223] It is time to recognize that actual child sexual abuse should be punished more harshly than activity which may merely encourage such abuse.

Child pornography trafficking offenses are punished under section 2G2.2. At present, that guideline does not distinguish between virtual child pornography and child pornography in which children were used as models.[224] Such a distinction should be built into the guideline, and the base offense level for virtual child pornography should be set at twelve, which is two-thirds of the offense level of eighteen established for a simple statutory rape under section § 2A3.2(a)(3). The present enhancements for multiple images,[225] distribution for pay or something of value,[226] distribution to a minor,[227] violent depictions,[228] and for engaging in a pattern of activity of sexual abuse or exploitation,[229] could be retained. However, the enhancement for use of a computer in transmitting an image[230] should not apply to virtual child pornography, as the use of a computer is a necessary component of the crime, and is the very reason that such pornography can be created and used without directly harming a child.

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[222] *Id.* § 2S1.3(b)(1).

[223] *See supra* notes 67-68 and accompanying text.

[224] U.S. SENTENCING GUIDELINES MANUAL § 2G2.1 (2003).

[225] *Id.* § 2G2.2(b)(6).

[226] *Id.* § 2G2.2(b)(2)(A), (B).

I have limited my arguments here to virtual child pornography, and have not addressed that pornography which is created using children. That limitation is intentional—the type of pornography which is not "virtual" causes a direct harm to the child who is used as a subject, and thus is not a good fit for the analysis applied here. At any rate, the Feeney Amendment expresses a special concern with pornography which directly harms children,[231] and that concern warrants some deference.

3. Bulk Cash Smuggling

Bulk cash smuggling is illegal largely because it facilitates theft and fraud, but the cash smuggling, even if apparently innocent, presently results in a stricter sentence than a theft itself.[232] Again, I urge the invocation of the two-thirds rule. The present base offense level for theft and fraud is six,[233] to which is added a number corresponding to the amount of money gained.[234] For a theft of $10,000, for example, the base offense level is ten (six plus four for the amount of money taken).[235] The guideline for bulk cash smuggling, in turn, starts with an offense level of eight,[236] and then adds to that

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[227] *Id.* § 2G2.2(b)(2)(C), (D).

[228] *Id.* § 2G2.2(b)(3).

[229] *Id.* § 2G2.2(b)(4).

[230] *Id.* § 2G2.2(b)(5).

[231] PROTECT Act, *supra* note 15.

[232] *See supra* notes 72, 78 and accompanying text.

[233] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(2) (2003).

[234] *Id.* § 2B1.1(b)(1).

[235] *Id.* § 2B1.1(a)(2), (b)(1)(C).

[236] *Id.* § 2S1.3(a)(1). Specifically as to bulk cash smuggling, the base offense level is six, which is then increased by two points if bulk cash smuggling is involved. *Id.* § 2S1.3(a)(2), (b)(1)(B).

number the amount of money, using the table included in the theft and fraud guideline.[237]

To create a more equitable guideline, sentencing for bulk cash smuggling should start with a base offense level of four,[238] without an enhancement applying only to that crime. The enhancement for amount could either be retained as is or altered to reflect the same two-thirds proportion.[239] The simple adjustment to the base level and elimination of the bulk cash smuggling enhancement will, on its own, bring the sentence for that crime below that for outright theft or fraud.

4. Fraudulent Documents and Immigration

Under the Guidelines, the base offense level for illegally entering the United States is eight.[240] The base offense level for commercially altering a document for someone else to use, however, is eleven.[241] Applying the two-thirds rule, the base offense level for the latter crime could be adjusted to six. However, the current enhancement for multiple documents[242] should be retained and even boosted, so as to account for those who sell just two documents. This would allow for a sure approach to the multiplier effect, which is clear and measurable in this type of case—twice as many documents will likely result in twice as much harm. If what we truly care about is stopping the flow of illegal immigration, this will focus efforts where they are most efficacious—on those who produce many false documents.

In addition, the provisions covering harboring an alien[243] and marrying an alien for immigration purposes[244] should similarly be adjusted, so that the alien who gets the benefit of the immigration is not punished more lightly than the unpaid, but lawbreaking, individual who has chosen to help the immigrant. Again, the provisions for multiple instances could be retained or increased to deal directly with the problem of multiple harms.

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[237] *Id.* § 2S1.3(a)(2).

[238] Four is two-thirds of the base offense level for theft, which is six. *Id.* § 2B1.1.

[239] Proportionate alteration of Guideline schedules is not currently a part of the Guideline scheme. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2003). Adjustment of base offense levels would fit more neatly with established practice in federal sentencing.

[240] *Id.* § 2L1.2(a). Notably, the base offense level for acquiring illegal identity documents is the same. *Id.* § 2L2.2(a).

[241] *Id.* § 2L2.1(a).

[242] *Id.* § 2L2.1(b)(2).

[243] *Id.* § 2L1.1.

5. Firearms Possession

The firearms laws and guidelines are more complex than most of the others discussed here. For one thing, the crimes committed with firearms are many and varied, and are subject to a wide variety of statutes from which prosecutors may pick and choose on any individual case. However, the principle firearms possession guideline, section 2K2.1, could be simply modified. The basic base offense level for a prohibited person, which applies in the absence of prior convictions or illegal types of weapons, is fourteen.[245] As a comparison, let us look to an aggravated assault where a gun is brandished.[246] There, the offense level is eighteen.[247] Applying the two-thirds rule, this would cause us to reduce the basic base offense level under section 2K2.1(a)(6) to twelve, a decrease of two points, with similar adjustments in the other base levels.

Here, too, we should be mindful of the multiplier possibility, and maintain or strengthen the enhancements for multiple guns found in section 2K2.1(b)(1).

6. Narcotics

Narcotics poses the thorniest reform problem of all. Attempts to rachet drug sentences downward have been uniformly rejected, and the guideline ranges are bolstered by the apparently intractable mandatory minimum sentences mandated by statute.[248] Still, attempts at drug sentence reform continue, and if reform comes it should be considered in the context of other parts of the Guidelines which pose the same problem of over-valuing indirect threats. Consistency, of course, would require that Congress and the Sentencing Commission identify an indirect harm which they feel may be caused in part by drug trafficking, and then peg the sentence to that, using the two-thirds model.

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[244] *Id.* § 2L2.2.

[245] *Id.* § 2K2.1(a)(6).

[246] This is a more serious offense than the assault described and used as a basis of comparison in Section III.D. I consider the more serious crime here in order to utilize a crime which is more in the middle of those firearms offenses considered by the Guidelines.

[247] U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(a), (b)(2)(C) (2003).

For example, we could use manslaughter as a gauge by which to peg the sentences for heroin. The base offense level for voluntary manslaughter is twenty-five.[249] If we were to guess that one manslaughter may result from every one kilogram of heroin sold, it would give us a baseline from which to consider drug sentences. Using the two-thirds rule in comparison to manslaughter, we find that the base offense level for one kilogram of heroin should then be seventeen. That calculus could then be used across the existing drug sentence table at Guidelines section 2D1.1(c), with a wholesale readjustment in keeping with this core calculation.[250] This basis for readjustment may seem arbitrary, but it is much less arbitrary than the system currently in place, which makes no attempt whatsoever to directly link the proportionality of different crimes, but rather has simply reacted to prior practices and the political winds.

C. The End of the Big Lie

I am not arguing that we need to reduce sentences because they "just aren't fair," or that we need to reduce drug sentences because of sympathy to drug dealers. Rather, I object to a system of proportionality which is not just fundamentally flawed, but is fundamentally unprincipled. Consistently, the Federal

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[248] For example, the mandatory minimum sentence for one gram of LSD is five years. 21 U.S.C. § 841(b)(1)(B)(v) (2000).

[249] U.S. SENTENCING GUIDELINES MANUAL § 2A1.3(a) (2003).

[250] For example, five to fifteen kilograms of cocaine is now sentenced at the same base offense level thirty-two as one to three kilograms of heroin. *Id.* Both would be reduced to a base level seventeen. *Id.* § 2D1.1(c).

Guidelines direct harsher sentences for actions which create an *indirect* risk of harm than they do for the act which directly causes that harm. That is not a principle—it is a historical accident.[251] Creating a fair proportionality in the Guidelines is one of the Sentencing Commission's primary jobs—and one which it has never systemically undertaken.

The time has come to take on that project, and confront the big lie: That, somehow, the sender of a shadowy image is worse than a man who rapes a child, and the seller of five grams of crack is worse than a killer. In the end, after all, criminal law is all about managing tragedy, and we must focus on what the true tragedy is—the wife who was killed, the young daughter who was raped, and the blood that has flowed while we looked away and talked amongst ourselves about drugs and pictures.

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[251] *See* discussion *supra* Section II.

SEPARATION OF POWERS AT THE STATE LEVEL, PART II: SERVICE IN A CIVILIAN PUBLIC OFFICE AND IN THE NATIONAL GUARD

Judge Leslie H. Southwick[*]

Note: The first part of this Article appeared in the Spring 2003 issue of the Mississippi Law Journal[1]

The year was 1898. An American war against Spain was imminent as the result of the sinking of the battleship *Maine.* The United States issued a call for over 100,000 volunteers. The irrepressible Teddy Roosevelt was the most public figure associated with the First Volunteer Cavalry Regiment, to be known thereafter as the "Rough Riders."[2] A 1997 movie by that latter name "dramatizes"—a gentle word for taking vast factual liberties—the path that this future President and some of his comrades took towards and, only for some, back from war.[3] The early portion of the movie has scenes in which a wide variety of Americans respond to their country's summons.[4] One volunteer and his wife had been operating a struggling restaurant in a frontier town in the American West. Leaving their empty café, the man justifies his going to war by telling his despondent spouse, "a man's gotta do what he has to do."[5] His wife answers, disgustedly, "and a woman has to do everything else."[6]

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[1] Judge Leslie Southwick, *Separation of Powers at the State Level [Part I]: Interpretations and Challenges in Mississippi*, 72 MISS. L.J. 927 (2003) [hereinafter Southwick, *Separation of Powers [Part I]*.

[2] EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 613-14 (1979).

[3] ROUGH RIDERS (Turner Pictures 1997).

That scene may resemble the experience of many soldiers and spouses, active or reserve component, during a deployment. In recent decades, the United States military, in its deployments, has increasingly integrated part-time National Guard and federal reserves soldiers into a force that also includes soldiers who have already been serving full-time. To be successful, this amalgam of troops requires that a large contingent of private citizens be available who have been trained in the art of war. The concept presumes that such a joinder, at the time of national emergency, will form a seamless force to preserve, protect and defend this country. Theory and practice often diverge, but at the beginning of the twenty-first century, operations of the United States military are extraordinarily reliant on soldiers from the states' National Guard and federal reserves.

As just the most recent example, mobilizations and deployments for Operation Iraqi Freedom have summoned citizen soldiers on short notice to leave their civilian occupations behind and enter into active military duty. Many personal and family challenges arise. Some of the problems are financial, since military pay may be less than the Guard or Reserve soldier was earning in a civilian position. Burdens of responsibility for the care of children, previously shared, fall on the parent who is left behind. The challenges are myriad.

Sometimes the challenge may even be a constitutional one. Among the livelihoods from which part-time soldiers are called is that of public office. May a member of a state's National Guard, the United States Army Reserves, or a reserve unit of one of the other armed services also serve as an elected or appointed governmental official? One of the specific questions, which is the primary one faced here, is whether such service is consistent with the requirements of separation of powers under state and federal constitutions. Presently, one United States Senator and six members of the United States House of Representatives also serve in a Reserve unit of a federal military service or in their state's National Guard.[7] The number of state elected officials who are simultaneously members of federal reserve units or the National Guard is unknown.

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[4] *Id.*

[5] *Id.*

[6] *Id.* As we were watching the movie, my wife, Sharon, made special but supportive note to me of the quoted dialogue.

The potential problem is easily identified but less easily resolved. The United States Department of Defense is part of the executive branch. The commander-in-chief is the head of the executive branch. Does someone who serves on active federal military duty become a member of the federal executive branch? If so, does that prevent the person from also serving as a member of Congress or a federal judge? In a state's National Guard when it has not been called to federal military service, the question is similar. Does a state legislator or judge violate that state's separation of powers principles by also serving in the National Guard?

The United States Supreme Court came close to resolving the federal component of the question during the Vietnam War, but stopped short of that goal.[8] The principal focus here, though, will not be on federal law but on state constitutional issues. The Mississippi Constitution will be used as a representative example. The relevant provisions of Mississippi's constitution are useful since they are similar to those in the constitutions of many other states. The separation of powers issues were raised in a suit brought in 2001 against a general in the Mississippi National Guard who was simultaneously serving as a justice on the Mississippi Supreme Court.[9]

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[7] Email from Clayton Heil, Legislative Director and Counsel to United States Senator Thad Cochran, to Judge Leslie H. Southwick, Mississippi Court of Appeals (Oct. 28, 2004) (on file with author).

[8] See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), discussed *infra* notes 373-77 and accompanying text.

Whether a state judicial or legislative branch official may also be in a state National Guard will be approached from several different perspectives. The first will be whether standard state constitutional language regarding separation of powers interferes with such dual service. Also discussed will be the federal component of those legal issues, since the present-day National Guard is significantly intertwined with the federal military. Federal statutes may in some manner preempt contrary and divergent state law. Even if that is so, there may also be a federal standard against which to measure the minima of state separation of powers. This will also be examined.

A. *Separation of Powers Under the Mississippi Constitution*

The background of state separation of powers and the origins of the language in Mississippi's constitutions were reviewed in the earlier published section of this Article.[10] The state's first constitution, adopted in 1817, contained this statement of the principles of separation:

> The powers of the government of the state of Mississippi, shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.[11]
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> . . . No person or collection of persons, being of one of those departments, shall exercise any power, properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.[12]

This initial state charter was written thirty years after the

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[9] Hewes v. Langston, 853 So. 2d 1237, 1255 (Miss. 2003) (McRae, J., dissenting) (arguing Justice Waller violated the separation of powers by serving as Brigadier General in the Mississippi National Guard).

[10] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 938-44.

[11] MISS. CONST. of 1817, art. II, § 1.

[12] *Id.* § 2.

United States Constitution was drafted in Philadelphia. Explicit language requiring that the powers of government be kept separate does not appear in the Federal Constitution. Some prominent national leaders, including future president John Adams, found that omission to be a serious flaw.[13] In 1789, Adams wrote Jefferson to inquire about his view of the need to amend this new federal charter.[14] It was Adams's belief that the "greatest and most necessary of all Amendments, the Seperation [sic] of the Executive Power, from the Legislative seems to be better understood than it once was."[15] When Jefferson responded, he did not mention the need for such an amendment.[16] Whatever his precise complaints, it is clear that the Sage of Monticello was not wholehearted in his endorsement of the Constitution. He had not attended the Philadelphia convention in 1787, as he was on diplomatic missions in Europe.[17] When he was able to study the final version, he found "a great mass of good in it, in a very desirable form: but there is also to me a bitter pill, or two."[18] Jefferson's objections centered on the absence of a bill of rights and failure to limit the number of terms that a President could serve.[19]

A few years before the Founding Fathers gathered in Philadelphia, Jefferson, in 1783, wrote a draft for a new Virginia constitution.[20] That document contained an explicit mandate that three distinct departments of government exist and the powers of each be kept separate from the powers of either of the others.[21] By 1788, a Philadelphia publisher printed

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[13] Adams to Jefferson (Mar. 1, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 599 (Julian P. Boyd ed., 1958).

[14] *Id.*

[15] *Id.*

[16] Jefferson to Adams (May 10, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 116 (Julian P. Boyd ed., 1958).

[17] *Id.*

[18] Jefferson (from Paris) to Edward Carrington (Dec. 21, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 445-47 (Julian P. Boyd ed., 1955).

[19] Jefferson to James Madison, (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 18, at 440-41.

[20] *See* Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 942.

[21] *Id.*

Jefferson's *Notes on the State of Virginia*, which included, in an appendix, the draft constitution with the separation of powers language.[22] Several states placed this explanation of separation of powers into their constitutions.[23] In some manner, this language also was available to the delegates at the 1817 state constitutional convention held in Washington, Mississippi, near Natchez. The chairman of the convention's drafting committee was a Virginia-trained lawyer named George Poindexter.[24]

Only minor punctuation and the order in which the three branches of government are referenced differentiate the 1817 Mississippi Constitution's language on separation of powers from the 1783 Jefferson version.

Adopting this language were Jeffersonian political disciples who filled the ranks of this first group of Mississippi constitutional convention delegates.[25] Drafting committee chairman Poindexter was a Jeffersonian Republican and Virginia-trained lawyer who earlier had been chosen for the territorial assembly and as a territorial delegate.[26] He would become Mississippi's first congressman and second governor as a Jeffersonian.[27] As discussed in much greater detail in the earlier published part of this Article on state separation of powers, Jefferson believed that giving too much power to the legislative branch "is precisely the definition of despotic government."[28] He wrote that governmental powers must be diffused:

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[22] *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XIII, *reprinted in* THOMAS JEFFERSON, WRITINGS 245 (Merrill D. Peterson ed., 1984). A search of the University of Virginia library's on-line catalog revealed several editions of 1784, 1785, 1787, and 1788. Until the Philadelphia edition, they had been printed in Paris, London, and Leipzig. http://virgo.lib.virginia.edu/. The 1788 edition is called the "first American edition," and has this publishing information: "Philadelphia, Printed and sold by Prichard and Hall, in Market Street, 1788."

[23] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 938-40 (stating Tennessee, Kentucky and Louisiana used the Jeffersonian language).

[24] Winbourne Magruder Drake, Constitutional Development in Mississippi, 1817-1865, at 65, 98 (1954) (unpublished Ph.D. dissertation, University of North Carolina) (microfilm copy on file with Mississippi Department of Archives & History).

[25] Robert V. Haynes, *The Road to Statehood*, *in* 1 A HISTORY OF MISSISSIPPI 217, 247 (Richard Aubrey McLemore ed., 1973).

[26] *Id.* at 248.

[27] Suanna Smith, George Poindexter: A Political Biography 50, 64 (1980) (unpublished Ph.D. dissertation, University of Southern Mississippi) (on file with author).

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[29]

Jeffersonian thought on separation of powers was part rhetorical excess and part reality. As my previous Article discussed, the best representation of what Jefferson was seeking to accomplish with separation of powers was likely reflected in the views of the Anti-Federalists:

> Though Anti-Federalists could write with absolutes in criticizing this mixture [of powers in the proposed federal constitution], they too used rhetoric that went beyond their meaning. It would appear that the Anti-Federalists wanted less interaction between the departments of government but accepted that total separation was not possible. A disconnect between rhetoric and reality may well infect the polemics of every age.
>
> . . . .
>
> . . . The differences between the framers and the objectors on separation of powers are only at the margins: the Anti-Federalists wanted a proclamation in the constitution, followed by a little more separation, a little less mixing. Very few in the debate believed that complete separation was achievable or desirable.
>
> Mississippi's constitution was created by political descendants of those who were not completely enamored with what had been created by the Founding Fathers in Philadelphia in 1787. We should not interpret the 1817 constitution or its successors through an expectation of pure separation of powers. To do so would misconceive the philosophical parentage of the state's constitution drafters. [30]

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[28] JEFFERSON, *supra* note 22, at 245.

[29] *Id.*

[30] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 952-53, 958.

Jefferson's initial language continues to dominate the present Mississippi Constitution, adopted in 1890. The current version, though, has some changes:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[31]
>
> . . . .
>
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[32]

Section 2 contains the only significant additional language and deletions. The exercise of one branch's powers by a "person or collection of persons" in another branch is still prohibited, but the exception for "instances hereinafter expressly directed or permitted" was removed.[33] Added was a prohibition on holding offices in two different departments of government and a penalty for doing so. The two parts of this provision—prohibiting exercising powers of one branch while belonging to another, and prohibiting holding offices in two different branches—are related but distinguishable matters. If a statute grants to a "collection of persons, being one or belonging to one of these departments," any powers that "properly belong to either" of the other branches, then those foreign powers are unconstitutional and of no effect.[34] Running afoul of the second sentence of the section requires that someone hold actual offices in two separate branches.

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[31] MISS. CONST. art. I, § 1.

[32] *Id.* art. 1, § 2. The constitution as now officially printed has descriptive headings on the sections, but they were not part of the constitution as adopted. JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI: BEGUN AT THE CITY OF JACKSON ON AUGUST 12, 1890, AND CONCLUDED NOVEMBER 1, 1890, at 638 (1890) [hereinafter JOURNAL OF PROCEEDINGS]. Article I, section 1 is now captioned "Powers of Government" and section 2 is called "Encroachment of Power." MISS. CONST., art. 1, §§ 1, 2.

[33] *Compare* MISS. CONST., art. 1, § 2, *with* MISS. CONST. of 1817, art. II, § 2.

There are a few modern state supreme court precedents that have examined these provisions. In *Alexander v. State ex rel. Allain*,[35] the court held that legislators could not constitutionally serve as members of the governing bodies for various boards and commissions that performed executive branch functions.[36] The required separation was not absolute, however.[37] The legislature may adopt a statute that allows one branch to encroach slightly into the functions of another.[38]

> Indeed, if the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument of appellants that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities of the boards and commissions are ongoing and are in the upper echelons of governmental affairs, as are the boards and commissions under consideration, then the legislative trespass reaches constitutional proportions.[39]

This is not a doctrine of purity but one of checks and balances. The purpose of separating power was to prevent "the powers properly belonging to one of the departments [from being] directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[40]

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[34] *In re* R.G., 632 So. 2d 953 (Miss. 1994) (holding that a statute that gave to youth court judges the executive power to select and supervise school attendance officers was a void power, but the youth court judge did not lose his office.)

[35] 441 So. 2d 1329 (Miss. 1983).

[36] *Alexander*, 441 So. 2d at 1346, *modified*, Dye v. State *ex rel.* Hale, 507 So. 2d 332 (Miss. 1987).

[37] *Id.* at 1336-37.

[38] *Id.*

[39] *Id.* 1337.

[40] *Id.* at 1336 (quoting THE FEDERALIST, No. 48 (James Madison) (J. Cooke

A few years later the court found that some exceptions to separation of powers are written into the state constitution. In *Dye v. State ex rel. Hale,* the court held that the constitution created the office of lieutenant governor in which legislative power was blended with executive power.[41] The court also concluded that no significance should be given to the fact that the 1890 constitution had dropped the language that had appeared in the three preceding Mississippi constitutions to the effect that powers must be kept separate "except in the instances in this Constitution expressly directed or permitted."[42] The court examined the records of the 1890 convention and found that this traditional language had been retained by the convention itself and only dropped once a drafting committee began its work.[43] The final drafters may have found the language surplusage since specific other constitutional language of course controlled over the general propositions of section 2.[44]

This is the background for understanding the present Mississippi constitutional language on separation of powers. With this foundation, it is time to turn to the specific issue of service in the National Guard by those who hold an office in one branch of state government.

B. Mississippi Litigation on Dual Service in State Office and in the National Guard

The origins of the Mississippi litigation contesting the constitutionality of holding a high office in the National Guard and in the judicial branch arose from events in 1993. According to a later civil complaint, a woman was raped during the burglary of her apartment in Jackson, Mississippi.[45] In her suit brought in Hinds County Circuit Court, styled *Doe v. Stegall,* she alleged that the apartment complex owners were negligent

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ed., 1961).

[41] *Dye*, 507 So. 2d at 343.

[42] *Id.* at 343 n.17.

[43] *Id.*

[44] *Id.*

[45] Doe v. Stegall, 757 So. 2d 201 (Miss. 2000).

in their security measures.[46] Summary judgment was granted to the defendant.[47] On the first appeal, in an opinion written by Justice William Waller, Jr., the Supreme Court reversed because of its conclusion that disputed material facts existed.[48] This judge's authorship favoring the plaintiff would prove ironic. On September 25, 2001, the circuit court again granted summary judgment to the defendant.[49] Doe again appealed and again would be granted relief.[50]

In February 2002, while the second appeal was beginning, Doe brought suit against Justice Waller.[51] She sought the judge's removal from the Court.[52] It is impossible to avoid the conclusion that at least some of the motivation for the suit arose from considerations other than protecting the integrity of separation of powers. A newspaper columnist suspected these motivations:

> "Doe" is represented in the case by well-known Jackson trial lawyer Shane Langston—who just happens to be the son-in-law of another justice [Chuck McRae] on the state's highest court.
>
> . . . .
>
> . . . [I]t's clear that the Waller lawsuit is nothing more or less than the latest salvo in what has become a war for control of the state Supreme Court between trial lawyers and the business and professional community.
>
> If the suit against Waller is successful, Gov. Ronnie Musgrove—the poster boy for trial lawyer campaign contributions—will appoint his successor. That's the fact that strikes

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[46] *Stegall*, 757 So. 2d at 202.

[47] *Id.* at 201.

[48] *Id.* at 206.

[49] Doe v. Stegall, No. 2001-CA-01674-COA, 2003 Miss. App. LEXIS 1068 (Miss. Ct. App. Nov. 18, 2003).

[50] The second appeal of the personal injury suit was deflected to the Court of Appeals after a majority of the Supreme Court justices recused themselves, including Justice/General Waller. *Stegall*, 2003 Miss. App. LEXIS 1068, at *1. Court of Appeals Judge/Major Southwick also recused himself based on the pending separation of powers litigation. *Id.* The Court of Appeals reversed and remanded for a third set of trial court proceedings. *Id.* at *16.

[51] Doe v. Waller, No. G2002-208 S/2 (Hinds County Cir. Ct. 2002).

[52] *Id.*

fear in the hearts of the state's business community.[53]

A summary judgment motion was filed by Justice Waller, but no ruling was ever made. Instead, the trial judge granted a voluntary dismissal of the complaint on August 29, 2003.[54] Therefore, no decision on the merits of the litigation needed to be made.

What will be examined here are the significant and varied issues that the suit raised. Several different perspectives will be used. The original understanding of militia service will be sought. However, it is also true that the nature of militia service, as well as the federal government's involvement with the state militias, has drastically changed since 1817.[55] That history will be discussed first, since the changing realities may affect the separation of powers principles.

C. Service in the Militia

The history of the American Army has, from the beginning, actually been the story of two armies. This history began on the night of April 18-19, 1775. Paul Revere was watching for a signal to be given from Boston's Old North Church:

> And lo! as he looks, on the belfry's height
> A glimmer, and then a gleam of light!
> He springs to the saddle, the bridle he turns,
> But lingers and gazes, till full on his sight
> A second lamp in the belfry burns![56]

Revere rode hard to warn Massachusetts minutemen that the British were sailing up the Charles River before disembarking to approach Lexington and Concord.[57] The redcoats were after military supplies stored there by militia leaders.[58] Alerted, scores of shopkeepers and farmers formed up in the village commons, then fired the shots that were heard around the world.[59] Armed men from all over New England started to gather, many of them experienced in the colonial militias.[60] These troops formed one of the two historic categories of armed forces—citizen soldiers who leave their everyday pursuits when the clarion is sounded in order to perform their military duty. The survivors later return to their civilian lives.

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[53] Sid Salter, *Waller Suit New Salvo in War for the Court*, CLARION-LEDGER (Jackson, Miss.), Mar. 31, 2002, at 1G.

[54] *See* Order of August 29, 2003, Doe v. Waller, No. G2002-208 S/2 (Hinds County Cir. Ct. 2002), *filed in* Hinds County Circuit Court Order Book 1624, at 601; *see also* Sid Salter, *Waller Lawsuit Withdrawn by "Wonda Doe,"* CLARION-LEDGER (Jackson, Miss.), Sept. 17, 2003, at 9A.

[55] H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of The Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 511-47 (2000).

[56] HENRY WADSWORTH LONGFELLOW, PAUL REVERE'S RIDE (Fitchenry & Whiteside Ltd. 1963) (1861).

The other army descends from the one formed two months after Lexington and Concord. On June 14, 1775, the Congress, meeting in Philadelphia, called for the raising of ten companies of riflemen.[61] The Army having been authorized, Congress on the next day drafted the militia gathered in Boston to join it. George Washington was named commander in chief.[62] Over the next several years, through privations, bitter rivalries among commanders and politicians, defeats and occasional victories, Washington's little army not only endured, it prevailed.

The state militias also continued beyond the victories they had won in April, 1775. The glories of Lexington and Concord soon faded. During the Revolution, the short militia enlistments, poor discipline and training, and limited equipment and ammunition, made General Washington often despair of the militia's worth to the cause: "[They] come in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provision, exhaust your stores, and leave you at last in a critical moment."[63]

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[57] JOHN D. HICKS & GEORGE E. MOWRY, A SHORT HISTORY OF AMERICAN DEMOCRACY 76 (2d ed. 1956)

[58] *Id.*

[59] *Id.*

[60] *Id.* The earliest colonial militias were formed on December 13, 1636, and were the North, South and East Regiments, Massachusetts Militia. Nat'l Guard Reg. § 870-5(4)(a)), *at* http://www.ngbpdc.ngb.army.mil/arngfiles.asp (Jan. 31, 1994); *see also* GEN. JOHN R. GALVIN, THE MINUTE MEN 1-5 (2d ed. rev., Pergamon Brassey's 1989) (1967) (giving a summary of the colonial militias). Using 1775 as the origin of the current National Guard is based on the fact that Lexington and Concord were the first battles of independence, transforming the militia from one in support of the colonial system to one that furthered an independent United States of America. *Id.* at ix-xiv.

[61] *Id.*

[62] RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 29 (1967).

In the more than two centuries that have followed, the small regular army of the Revolution, led by a nationally named commander, has been succeeded by a massive and permanent military establishment. The militia has also continued, perhaps transformed just as dramatically from its origins as has been the regular army.

1. The Federal Constitution and the 1792 Militia Act

The Federal Constitution permitted Congress to "provide for organizing, arming, and disciplining the Militia,"[64] a right first exercised with passage of the Militia Act of 1792. The Act required the enrollment into the state militia of every free white male between the ages of eighteen and forty-five.[65] Every man was, within six months, to equip himself with "a good musket or firelock," ammunition, bayonet, and other equipment.[66] The Act identified these exemptions from enrollment:

> The Vice President of the United States; the officers judicial and executive of the government of the United States; the members of both Houses of Congress, and their respective officers; all custom-house officers with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen employed at any ferry on the post road; all inspectors of exports; all pilots; all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be exempted by the laws of the respective states . . . .[67]

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[63] JOHN K. MAHON, THE AMERICAN MILITIA, DECADE OF DECISION, 1789-1800, at 5 (1960).

[64] U.S. CONST. art. I, § 8, cl. 16.

[65] Militia Act, ch. 33, § 1, 1 Stat. 271, 271-72 (1792).

[66] *Id.*

[67] *Id.* § 2.

As the statute indicates, the states could add to the list of exemptions. Mississippi's exemptions will be mentioned later. The militia could be summoned by the President into federal service, but not for longer than three months in any one year.

The 1792 Militia Act provided for what has been called a militia-of-the-whole. All able-bodied males between certain ages were required to enroll and to appear when called, unless exempted by statute.[68] Relying on the entire citizenry was a bow to concerns about a standing army. In the early days of the Republic, there were some who wanted a cadre of "select militia" to receive much more significant training and equipment than would be available for a militia-of-the-whole. George Washington sought a "Continental Militia, selecting every 10th, 15th or 20th Man from the Rolls of each State for the purpose; Organizing, Officering and Commissioning those Corps upon the same principle as is now practiced in the Continental Army."[69]

This concept was strongly opposed by the Anti-Federalists. The concern was that a select militia would become the equivalent of a standing army.[70] The Anti-Federalist *Federal Farmer* called such an army "anti-republican."[71]

> These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless [sic]; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select

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[68] *Id.* § 1.

[69] George Washington, *Sentiments on a Peace Establishment*, *in* R. ERNEST DUPUY, THE NATIONAL GUARD: A COMPACT HISTORY 154, 163 (1971).

[70] Letter from the Federal Farmer (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 241-42 (Herbert J. Storing ed., 1981).

[71] Letter from the Federal Farmer (Jan. 25, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 70, at 342.

> militia, must be influenced by a truly anti-republican principle . . . .[72]

The Federalists had similar concerns:

> [T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.[73]

Tyranny would result from failing to rely on the general public as the militia, since that would leave weapons largely in the hands only of the select militia. The meaning of the Second Amendment becomes central to the current understanding of the parts of the ratification debate that addressed the militia. Having just fought a Revolution with minutemen and a Continental Army, arming all shopkeepers and farmers was a discussion that could stir the emotions. Considering that a panel of the United States Court of Appeals for the Fifth Circuit in recent years released a sixty page opinion on the meaning of the Second Amendment, I will avoid entering that thicket.[74]

Having rejected providing for a select militia, the 1792 Militia Act also rejected providing money. Giving only minimal direction to the states, the Act gave no funds. Just the opposite occurred, as the Act placed a financial burden on those required to serve since they had to provide their own arms, ammunition, and other equipment.[75] The states gained the entire responsibility for administering the Act and could organize their militia in any fashion found to be "convenient."[76]

Professor Edward Skeen, a scholar of the use of the militia during the early republic, concluded that the "only uniform feature specified [in the Act] was that each state would have an adjutant general and each brigade a brigade inspector."[77] No changes to the federal statute were made until the 1903 Dick Act. In the meantime, the militia remained largely unorganized, unfunded, and when needed, largely unusable. Its failures during the second war with England, the War of 1812, revealed that "the militia was an unreliable main defense force."[78] One of the heroes of the war, General and (*much*-)later President William Henry Harrison, stated that "large corps of militia [went] into the field of battle without understanding a single elementary principle [of warfare.]"[79] The one bright exception, and that is because of intensive training before battle by General Andrew Jackson, was the performance of various units of state militia in the 1815 Battle of New Orleans after the peace treaty had been signed in Ghent.[80]

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[72] *Id.* The Federal Farmer made similar arguments in other letters. Letter from the Federal Farmer (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 70, at 241-42.

[73] Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990) (footnote omitted) (citing THE FEDERALIST No. 25, at 156-57 (Alexander Hamilton) (E. Earle ed., 1938).

[74] United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[75] Militia Act, ch. 33, § 1, 1 Stat. 271, 271-72 (1792).

[76] *Id.* § 3.

Years leading up to the War Between the States saw no improvement in the fortunes of the state militia. The 1792 Militia Act concept of universal and compulsory training of a military reserve was not realized in practice. Among the concept's varied problems was that the militia was too large—perhaps two million men were required to participate.[81] This was likely one of the reasons that most states continued to add to the exemptions from service.

> While the rest of the military-aged, white male population generally remained obligated to serve, in practice, more and more people simply could not or did not wish to interrupt their everyday economic activities in an increasingly bustling, productive, and differentiated society in order to appear armed and accoutered on the appointed muster day.[82]

All eligible men were required to muster for drilling, perhaps six times per year, but as the mid-century approached, only once a year.[83] Military leaders often ignored their soldiers' failure to muster. No meaningful training occurred nor were other preparations made for extensive military service.

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[77] C. EDWARD SKEEN, CITIZEN SOLDIERS IN THE WAR OF 1812, at 7 (1999).
[78] *Id.* at 3.
[79] *Id.* at 181.
[80] *Id.* at 169-74.
[81] *Id.* at 181.
[82] Uviller & Merkel, *supra* note 55, at 523.

Surprisingly, in light of present perceptions about pre-Civil War society, a large percentage of militiamen had no weapons. They marched with sticks and shovels as substitutes for muskets, making militia service appear ridiculous. Abraham Lincoln described his Illinois militia duty this way:

> We remember one of these parades ourselves here, at the head of which, on horse-back, figured our old friend Gordon Adams, with a pine wood sword, about nine feet long, and a paste-board cocked hat, from front to rear about the length of an ox yoke, and very much the shape of one turned bottom upwards; and with spurs having rowels as large as the bottom of a teacup, and shanks a foot and a half long. That was the last militia muster here . . . Flags they had too, with devices and mottoes, one of which latter is, "We'll fight till we run, and we'll run till we die."[84]

The failure of the militia system meant that the Mexican War, the War Between the States and the Spanish-American War were fought largely with volunteers, not with state militia moved directly into federal service. In the South after the Civil War, the militia power was suspended during the early years of Reconstruction. As states were reorganized first under military government and then readmitted to the Union, militia units again could be formed.[85] Around the country, volunteer military units were formed by eager citizens. They have been compared to volunteer fire brigades and served related purposes of responding to emergencies.[86] Some states passed statutes authorizing and otherwise regulating these organized militias.[87]

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[83] SKEEN, *supra* note 77, at 181-82.

[84] Speech to the Springfield Scott Club (Aug. 14, 1852), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 135, 149-50 (Roy P. Basler ed., 1953) (footnote omitted).

[85] WEIGLEY, *supra* note 62, at 263.

[86] Uviller & Merkel, *supra* note 55, at 529.

> Legislators made no pretence of reviving the long-defunct militia-of-the-whole, but did all they could to foster the respectable part of society's interest in joining organized and newly forming volunteer units, which pointedly kept their distance from the unorganized militias memorialized in the ancient laws. In part to distinguish themselves from the disreputable unorganized militia, organized volunteer companies styled themselves guards or national guards. The revitalization of state national guards coincided with a passion for reform and improvement then sweeping all the professions, and national guard officers aggressively pursued recognition and accreditation for themselves and their organizations.[88]

In 1877, leaders from many of the organized militias met in Richmond to form the National Guard Association.[89] Their objective was to obtain better funding from the states and from Congress, and to become recognized as the official organized militia force.[90] In part due to the labors of this Association, Congress passed an act named for Ohio Representative and National Guard Major General Charles Dick in 1903.[91] It brought almost all state militias into something much closer to their present form. It divided the militia-of-the-whole into those who had volunteered and joined an organized militia, now known almost everywhere as the National Guard, and the remainder of the eligible citizenry who were part of an unorganized militia.[92] Substantial federal funding was provided if the states complied with Army training requirements.[93]

Finally, the National Defense Act of 1916 made one more gigantic step, which was to provide that the federal government would equip and train the National Guard.[94] It "federalized" the Guard and placed it within the command structure of the regular Army under the control of the War Department.[95] Federal direction, for the first time, structured the Guard organization in each state, set standards for officers and made six years the term of enlistment.[96] There now would be dual enlistment, in which a guardsman was required to pledge allegiance to both the United States and to his home state.[97] The President could mobilize the Guard into federal service.[98] The effect of dual service on a Mississippi National Guardsman will be discussed later.

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[87] *Id.*

[88] *Id.* at 532 (footnote omitted).

[89] WEIGLEY, *supra* note 62, at 282.

[90] *Id.*

[91] *Id.* at 320-21.

[92] *Id.* at 321.

[93] *Id.* at 320-22.

[94] *Id.* at 348.

2. Mississippi's Constitution and Statutes

We leave the national picture to examine the parallel activities in Mississippi.

Neither the 1817 nor the 1832 constitution defined militia service. It is suggestive, though, that the 1817 delegates saw membership in the militia as a duty of citizenship:

> Every free white male person of the age of twenty-one years or upwards, who shall be a citizen of the United States, and shall have resided in this state one year, next preceding an election, [and who meets certain local residency requirements] and *shall be enrolled in the militia thereof,* except exempted by law from military service . . . shall be entitled to vote.[99]

In large measure, then, a man had to be in the militia in order to vote. Thirty years earlier, Thomas Jefferson used the label "militia" as a shorthand for the individuals whom he thought should be entitled to vote.[100] In criticizing Virginia's 1776 constitution, he stated that the "majority of men in the state, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders [entitled] to vote, not including generally the half of those on the roll of the militia, or of the tax-gatherers."[101] Jefferson compared how many "fighting men," meaning militia, were in different regions of the state and how disproportionate their representation was in the legislature.[102]

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[95] *See id.* at 348.

[96] *Id.* at 349.

[97] *Id.* at 348-49.

[98] *Id.*

[99] MISS. CONST. of 1817 art. III, § 1 (emphasis added).

[100] JEFFERSON, *supra* note 22, at 243-44.

The point here is that the term "militia" in the eighteenth and early nineteenth century did not refer to a small group of individuals who volunteered for military service as in the modern-day National Guard, but instead "militia" described the state's adult white males.

The militia statute passed by the first state legislature was entitled "An Act to Regulate the Mode of Appointing Militia Officers, and for Organizing the Militia of the State."[103] No requirements for service were enacted. Instead, the final section of the Act stated that all militia laws in force at the time of the adoption of the 1817 constitution, "and not inconsistent with the constitution and provisions of this act, be and remain in full force and virtue."[104] A compilation of the territory's statutes, prepared the year before statehood, revealed these requirements:

> The commanding officers of companies shall continually enrol [sic] every free white male, who shall have been ten days in their respective beats, and who shall be above the age of eighteen, and under the age of forty-five years, and shall give notice to such person of his enrolment [sic]. The territorial treasurer, auditor of public accounts, regularly licensed ministers of the Gospel according to the rules of their sects, teachers in the public seminaries, keepers of public ferries, on post roads, post-masters, and mail carriers, [territorial legislators,] territorial judges, the justices of the quorum and attornies [sic] general, be, and they alone, are hereby exempted from the duties of this act: *Provided*, That the clerks and sheriffs of the courts shall be exempted from ordinary militia duty, but not from draft for actual service.[105]

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[101] *Id.*

[102] *Id.*

[103] Act of Feb. 3, 1818, 1818 Miss. Laws 41.

[104] *Id.* § 19, 1818 Miss. Laws at 52-53.

[105] Act of Jan. 22, 1814, *in* STATUTES OF THE MISSISSIPPI TERRITORY; THE CON-

The governor could call the entire militia, or any part of it, whenever an emergency required.[106] The militia was otherwise to muster at least once every two months.[107] Though the soldier was to provide his own weapon and ammunition,[108] he was supposed to be paid the same as "United States troops."[109] These laws made the entire white male citizenry between the ages of eighteen and forty-five subject to this duty. Requiring militia duty for that same age group would be made part of the constitutions adopted in 1869 and 1890.[110]

The militia statutes were frequently amended prior to 1861, but need not be reviewed here. After defeat in the Civil War, the state was ordered, in 1865, to disband its militia; that ban was rescinded for a time, then reimposed for all ex-Confederate states in 1867.[111] Though the state's militia was reconstituted beginning in 1871, there was very little money for soldiers' pay or to provide supplies and equipment.[112] Congress provided a small appropriation annually beginning in 1882, but only for each state to organize artillery units.[113]

Under the 1792 Militia Act, the administrative head of each state's militia is an adjutant general.[114] On the heels of the national reorganization efforts, Governor Robert Lowry

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STITUTION OF THE UNITED STATES, WITH THE SEVERAL AMENDMENTS THERETO; THE ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO; THE ARTICLES OF AGREEMENT AND CESSION, BETWEEN THE UNITED STATES AND THE STATE OF GEORGIA; AND SUCH ACTS OF CONGRESS AS RELATE TO THE MISSISSIPPI TERRITORY 333 (Peter Isler 1816) [hereinafter STATUTES OF THE MISSISSIPPI TERRITORY]. A subsequent act added the exemption for legislators. Act of Dec. 24, 1814, *in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra*, at 343.

[106] STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 105, at 342.

[107] *Id.* at 334.

[108] *Id.* at 333.

[109] *Id.* at 339.

[110] MISS. CONST. of 1869, art. IX, § 1; MISS. CONST. art. IX, § 214.

[111] HISTORICAL ANNUAL: NATIONAL GUARD OF THE STATE OF MISSISSIPPI xxix (1938) [hereinafter HISTORICAL ANNUAL].

[112] *Id.*

[113] *Id.*

[114] Militia Act, ch. 33, § 1, 1 Stat. 271, 271-72 (1792).

named his son-in-law William Henry as the Adjutant General in 1886.[115] Two years later, the Mississippi legislature passed a bill to "establish an Active Militia," which it called the "National Guard."[116] In the new statutes, the militia was divided into two classes—the reserve militia that was compulsory for nonexempt men in the proper age group, and the voluntary national guard.[117] The reserve militia was said to "be exempt from military duty," except as already provided in the prior militia laws.[118] This reserve would be organized and ordered into active service solely at the discretion of the governor.[119]

The new National Guard became the primary state military force. Its enlistees would serve three years.[120] Not less than 900 nor more than 1800 men could be enlisted in the Guard at one time.[121] The governor was to reorganize the National Guard units that had arisen in the state prior to the Act, and to designate those who "may be enlisted in the national guard, and no others shall be enlisted."[122] When the president ordered a draft of the state's militia, the number required would first be taken from the National Guard.[123] Only if the state's quota could not be met would the reserve militia be drafted.[124] The 1888 Act stated that the National Guard, not the reserve militia, "shall at all times be first subject to the orders of the Governor" during an emergency.[125] In this way, the transition from the private and voluntary national guard into a public and voluntary guard was accomplished, and the relevance of the compulsory but inactive militia was greatly reduced.

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[115] HISTORICAL ANNUAL, *supra* note 111, at xxxvi. Henry's relationship to Lowry appears in several articles in the William Henry subject file at the Mississippi Department of Archives and History Library.

[116] Act of March 3, 1888, ch. 37, 1888 Miss. Laws 57 (codified as amended at MISS. CODE ANN. § 2866-2892 (1892)). Section 3 of the Act designated the organized militia as "The Mississippi National Guard." § 3, 1888 Miss. Laws at 57.

[117] *Id.* § 1.

[118] *Id.* § 2.

[119] MISS. CODE ANN. §§ 611, 617 (1880).

[120] MISS. CODE ANN. § 2876 (1892).

[121] *Id.* § 2877.

[122] *Id.* §§ 2876-2880. These provisions apparently were adopted with the 1892 Code, as they do not appear in the 1888 Act nor in a later amendment. *See* Act of Feb. 22, 1890, ch. 523, 1890 Miss. Laws 782; Act of March 3, 1888, ch. 37, 1888 Miss. Laws 57.

[123] MISS. CODE ANN. § 2888.

[124] *Id.* § 2886.

Manpower figures from this time were not discovered, but a comparison between the Guard and the reserve militia is available from 1920. The number of males eligible in 1920 for militia service was about 200,000, while the National Guard contained 1,200 officers and men.[126] Those numbers reflect the significance of the statutory changes in 1888. The Guard is similar to what George Washington wanted with a select militia—one in every ten or twenty or two hundred members of the militia receive intensive and regular training for military duty.

The 1890 constitution, written while the 1792 federal Militia Act was still in effect, still required "able-bodied male citizens of the state between the ages of eighteen and forty-five years" to serve, but "in such manner as the legislature may provide."[127] The first seven of the nine sections of the "Militia" article had all appeared in some form in one or more prior constitutions. However, the 1890 convention also met just two years after the National Guard had been officially established in the state. The last two sections of the Militia article referred to the Guard by name and required that the legislature make an "annual appropriation for the efficient support and maintenance of the Mississippi National Guard," and authorized counties to fund their Guard units.[128]

The constitution's command for funding and Adjutant General Henry's encouragement notwithstanding, still there was no state appropriation. In 1894, General Henry said that the Guard was "without recognition from the State Legislature, without money, except that which is generously contributed by its members . . . ."[129] Its most serious need was for the state to make a regular annual appropriation.[130] For a few more decades, citizen soldiers remained *pro bono* soldiers.

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[125] § 3, 1888 Miss. Laws at 57.

[126] HISTORICAL ANNUAL, *supra* note 111, at xxxiv.

[127] MISS. CONST. art. IX, § 214.

[128] *Id.* §§ 221-222.

[129] BIENNIAL REPORT OF THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI

The state constitution's language, adopted in 1890, still applies today and requires that the legislature "provide for the organizing, arming, equipping and discipline of the militia, and for paying the same when called into active service."[131] The current version of the statutes provides that the militia "shall consist of all able-bodied citizens of the state between the ages of seventeen (17) and sixty-two (62) years, who are not exempt . . . together with all other able-bodied persons who shall voluntarily enlist or accept commission, appointment or assignment to duty therein . . . ."[132] The current statute provides three classifications for the militia, which means a third category to those recognized in 1888 has been created. The unorganized militia consists of all citizens who fit the age category; the National Guard includes those who have enlisted or been commissioned; the Mississippi State Guard is a back-up to the National Guard that requires affirmative joinder.[133]

The State Guard is a relatively new concept, being recognized by statute only in 1950.[134] An earlier version was called the "Home Guards," and was created by the legislature in 1917 as a backup force since the National Guard had been mobilized for the Great War.[135] The State Guard consists of volunteers who enlist or are commissioned in advance of any emergency, may train to some extent, and, when the regular Guard has been mobilized, are to perform the duties normally undertaken by the National Guard.[136]

FOR THE YEARS 1892 AND 1893, at 4 (1894).

[130] *Id.* at 4-5.

[131] MISS. CONST., art. IX, § 215; *see also* MISS. CODE ANN. § 33-1-1(b) (2000) (defining "organized militia").

[132] MISS. CODE ANN. § 33-5-1 (2000). The statute does not limit the militia to male citizens, while constitutional section 214 does.

[133] *Id.* § 33-5-1; *id.* § 33-5-9 (stating when unorganized militia is subject to duty); *id.* § 33-5-51 (describing organization of State Guard).

[134] Act of Apr. 18, 1950, ch. 444, § 45, 1950 Miss. Laws 574, 574-75 (codified as amended at MISS. CODE ANN. § 33-5-51 (2000)).

[135] *See* Act of Oct. 12, 1917, ch. 42, 1917 Miss. Laws 41; HISTORICAL ANNUAL, *supra* note 111, at xxxiv.

[136] MISS. CODE ANN. § 33-5-51 (2000) (stating that the State Guard will "be

3. The Modern National Guard

Already described in this Article is Congress's 1903 Dick Act and the National Defense Act of 1916. The federalized Guard became an integral part of the command structure of the regular Army.[137] Though statutory provisions continued to evolve thereafter, the Guard, as it exists in the first years of the twenty-first century, was largely designed just before America's entry into the first Great War of the twentieth century. Now, when a private enlists or a colonel is promoted to brigadier general, that person is recognized as a member of both the National Guard of the United States and the Mississippi National Guard. The soldier is in only one or the other military capacities – or in civilian life – at one time, and never both a federal and a state soldier simultaneously.[138] Compliance with Army regulations for enlistment eligibility, training, promotion and the myriad other details of soldiering is required. The expenses of the Guard and the benefits paid to soldiers are from funds largely provided by the federal government. The 1817 Constitution's militia-of-the-whole, drilling infrequently and irregularly, unpaid and unprepared, and left to state regulation, is not the modern National Guard. Even the 1890 Mississippi National Guard, just recognized by state statute two years earlier, which was in 1890, still without either state or federal funding and not subject to meaningful federal requirements, has mutated.

In summary, the "militia" that consists of all able-bodied individuals of a certain age who are to be available for service when needed, still exists in theory and statute. However, that militia is not the National Guard. The regularly trained and paid members of the militia who form the National Guard are a voluntary subset of the militia of the whole. With that understood, recognition also needs to be given to yet another layer of complexity to the Guard of today. Full-time soldiers are needed

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utilized in aid to or in lieu of the Mississippi National Guard upon its mobilization.")

[137] Uviller & Merkel, *supra* note 55, at 536.

[138] Perpich v. Dep't of Def., 496 U.S. 334, 348 (1990).

to operate an organization such as the modern National Guard. The traditional militia, consisting of men who usually pursued their civilian occupations and only occasionally, if ever, reported for military duty, had no significant bureaucracy supporting their activities. Most Guardsmen remain in the traditional status of usually being civilians and only having monthly military drills and longer training at other times, but there must be some soldiers permanently in military status in order to operate the modern Guard.

Congress recognized this need for full-time Guardsmen. It authorized and funded a variety of full-time positions to manage the day-to-day and not just the weekend-to-weekend activities. These positions, such as military technicians[139] and Active Guard-Reserve soldiers,[140] have regular employment in the military. They also serve as traditional Guardsmen and in that capacity are subject to being called onto active military duty and taken away not from civilian jobs but from their full-time military positions.

One final layer of complexity in the needed understanding of the modern Guard arises from state law. In order to manage better the continuing affairs of the Guard, in 1966 the state legislature created the Mississippi Military Department:

> There shall be in the executive branch of the state government a Military Department. The Adjutant General shall be the executive head of the department and, as such subordinate only to the Governor in matters pertaining thereto. There shall be in such department two Assistant Adjutants General and such other officers and such enlisted men and civilian employees as the Adjutant General shall, from time to time, determine.[141]

This 1966 enactment gave detailed statutory recognition to the existence of a state military department. The only previous discovered statutory reference was a brief mention in a 1916 enactment regarding the "expenses of the military department."[142] The staff of the military department is declared to be part of the governor's military staff.[143] Certainly, there had always been a formal military role for the governor as the commander-in-chief of the state's military forces. However, the adjutant general and a few other officers and soldiers were the extent of his military staff. In 1938, for example, what was called the "State Staff of the Mississippi National Guard" consisted of nine officers and eleven enlisted soldiers.[144] By the first decade of the twenty-first century, the Military Department was a dramatically larger institution for management of the Guard. All Mississippi Guardsmen who have full-time positions as technicians or as part of the Active Guard-Reserve program are considered to be in the Military Department. There are approximately 12,300 Mississippi National Guardsman; of these, about 2,200 have full-time Guard employment and are assigned to the Department.[145] Each of these soldiers has a weekday job for the military and also has traditional Guard duties, often in a different position than his or her weekday job, of monthly drills and annual training. When the President mobilizes Guardsmen, as for Operation Iraqi Freedom, the members of the Military Department may be called away from their positions in order to enter active duty just as Guardsmen with civilian jobs are called away from theirs. In addition, traditional Guardsmen, i.e., those who are not full-time employees of the Military Department but who perform only periodic military duty, could be designated by the Adjutant General as members of the Department.[146] Thus, the Mississippi National Guard is the larger entity, with only some of those soldiers also being members of the statutorily-created executive branch agency.

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[139] 32 U.S.C. § 709 (Supp. 2004).

[140] 32 U.S.C. §502(f) (1980).

[141] Act of June 8, 1966, ch. 539, § 3, 1966 Miss. Laws 1040, 1042 (codified as amended at MISS. CODE ANN. § 33-3-3 (2000)).

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[142] Act of Apr. 7, 1916, ch. 245, § 68, 1916 Miss. Laws 383, 410. A quadrennial state government guide also began referring to a Military Department in the first edition published after this enactment, whereas previously an "Office of the Adjutant General" was the designation. *Compare* 1908 Miss. Reg. 961 (1908) *and* 1912 Miss. Reg. 332 (1912), *with* 1917 Miss. Reg. 525 (1917) *and* 1920-1924 Miss. Reg. 72 (1923).

[143] MISS. CODE ANN. § 33-3-5 (2000).

[144] HISTORICAL ANNUAL, *supra* note 111, at 2, 3.

[145] Telephone Interviews with Lyla Pinter, staff of Colonel Freddie L. Jones, Human Resources Officer for joint Forces Headquarters, Mississippi National Guard, and Darryl Womack, Director of Human Resources of the Mississippi National Guard (Oct. 18, 2004). To be distinguished from the full-time members of the state Military Department are the Guardsmen who have been mobilized by the President to active duty in the federal military. Such active duty soldiers are not in state service at all and, consequently, are not in the state Military Department. A few hundred civilians who have no military status are also employed by the Department in various capacities. *Id.*

Even though only a few members of the Guard are part of the military staff of the governor, all Mississippi Guardsmen are under the command of the governor unless they have been called to federal service.[147] The latter event places them under the President's command.[148] In the late 1980's, a governor challenged the authority of the President to federalize his state's Guard. In rejecting the claims, the Supreme Court explained the categories of Guard service. The Court found that "[i]n a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."[149] A "member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service."[150]

One rationale for this dual status arises from the argument made prior to World War I that soldiers in traditional militia (Guard) status could not be ordered to duty outside of the country.[151] When Mississippi Guardsmen are placed in federal status, they become part of the National Guard of the United States of America (NGUSA), which is an entirely separate legal entity from any state's National Guard. No soldier can be in the Mississippi National Guard and in NGUSA simultaneously. "'Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.'"[152]

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[146] The conclusion that traditional Guardsmen could be designated as members of the Military Department follows from the statutory authority for placing in the Department "such other officers, enlisted men and civilian employees as the adjutant general shall, from time to time, determine." MISS. CODE ANN. § 33-3-3 (2000).

[147] MISS. CODE ANN. § 33-3-1 (2000).

[148] *Id.*; MISS. CONST. art. V, § 119.

[149] Perpich v. Dep't of Def., 496 U.S. 334, 348 (1990).

[150] *Perpich*, 496 U.S. at 346.

[151] *Id.* at 343 n.13. In 1912, the Army wanted to use National Guard units in Mexico. Attorney General Wickersham concluded that this was impermissible because the Constitution permitted "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," not sending them into adjacent countries. *Id.* at 343 n.13. *See generally* U.S. CONST. art. I, § 8, cl. 15.

At the state level, the Mississippi Adjutant General is the "executive head of the [Mississippi Military] department and, as such, subordinate only to the governor in matters pertaining thereto."[153] The Adjutant General is both an officer of the Mississippi National Guard as well as the head of an executive branch agency.[154] Since the Adjutant General and certain other officers are placed in the executive branch agency called the Military Department, if any of those individuals are considered to have an "office" in the Military Department (a matter to be discussed later) as well as in another branch of government, they may be violating the constitution's separation of powers provisions.

Representative of the transformation of the original militia into today's National Guard is the history of one of the battalions in the largest unit in the Mississippi Guard, the 155th Separate Armored Brigade.[155] The Brigade, in 2004, consisted of six battalions, one of which was the 155th Infantry Battalion. That infantry unit is the seventh oldest of the historical regiments in the United States Army.[156] It traces its origins to an order entered by Mississippi's Territorial Governor on September 8, 1798 that required all males between sixteen and fifty years of age to organize into militia units.[157] A militia for an Upper District in the territory and one for a Lower District were created.[158] The Lower District Militia was organized on October 25, 1798 as the Militia of Adams County.[159] Once he was named as commander in Adams County, Lieutenant Colonel Daniel Clark, on June 1, 1799, received the first commission ever issued by a Mississippi governor to a militia officer.[160] Colonel Clark was at the same time a territorial judge, making the joinder of full-time judging and part-time military command a fact of life from the instant of birth of the officer corps for Mississippi's militia.[161]

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[152] *Perpich*, 496 U.S. at 346 (quoting Act of June 15, 1933, ch. 87, sec. 18, § 111, 48 Stat. 153, 161).

[153] MISS. CODE ANN. § 33-3-3 (2000).

[154] NeSmith v. Fulton, 615 F.2d 196, 199 (5th Cir. 1980)

[155] The officially recognized, then-current lineage for National Guard units was set out in a 1939 publication. Nat'l Guard Reg. § 870-5(6)(f), *at* http://www.ngbpdc.ngb.army.mil/arngfiles.asp (Jan. 31, 1994) (referring to 1939 NATIONAL GUARD REGISTER).

[156] A brigade is an Army unit that consists of from two to five battalions, while a battalion contains from two to four companies. LAWRENCE P. CROCKER, ARMY OFFICER'S GUIDE 470 (46th ed. 1993). The term "regiment" has several meanings, one being an armored cavalry unit that is about the same size as a brigade. *Id.* at 472. When used to refer to the 155th, though, it means an historical designation under the Army Regimental System. Regiments are "ceremonial

In 1802, the Adams County Militia was designated as the First Regiment of the Territorial Militia.[162] When former Vice President Aaron Burr was suspected in late 1806 of leading a military expedition down the Mississippi River in order to establish an independent republic in the southwestern United

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and historical organizations" that perpetuate the identity of military organizations through the various changes that occur as military needs change. Nat'l Guard Reg. § 870-5(6)(e) (Jan. 31, 1994).

[157] Order for Regulation of Militia from Winthrop Sargent (Sept. 8, 1798), *in* I MISSISSIPPI TERRITORIAL ARCHIVES, 1798-1803, at 36 (Dunbar Rowland ed., 1905).

[158] *Id.* at 39.

[159] Appointments from Winthrop Sargent (Oct. 25, 1798), *in* I MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 157, at 149-50.

[160] Militia Orders from Winthrop Sargent (June 1, 1799), *in* I MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 157, at 151.

[161] M.J. MULVIHILL, SR. FIRST MISSISSIPPI REGIMENT – ITS FOUNDATIONS, ORGANIZATION AND RECORD 5 (1931). Judge-Colonel Clark died on July 1, 1800, so his dual service was brief. *Id.*

Lineage rules for National Guard units are set by regulation: "the lineage of an [Army National Guard] unit is the history of that unit, its personnel, in a specific geographic area." Nat'l Guard Reg. § 870-5(4)(c), *at* http://www.ngbpdc.ngb.army.mil/arngfiles.asp (Jan. 31, 1994). One part of the headquarters for the 155th Infantry Brigade is located in Adams County, which has since 1799 had a militia unit. Thus, the battalion may claim lineage back to the 1798-99 formation of the Adams County militia.

[162] U.S. ARMY CTR. OF MILITARY HIST. DEP'T OF THE ARMY, LINEAGE AND HONORS CERTIFICATE: 155TH INFANTRY (Dec. 8, 1969) [hereinafter LINEAGE AND HONORS CERTIFICATE]; *see also* Appointments from William C.C. Claiborne (Apr. 1, 1802), *in* I MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 157, at 399.

States and northern Mexico, soldiers from the First Regiment were mustered in order to engage any troops who might be with Burr.[163] There were none.[164] Burr agreed to proceed to the territorial capital in Washington, near Natchez, and participate in an investigation of his actions.[165] During the War of 1812, First Regiment soldiers saw action with General Andrew Jackson against the Creek Indians, helped capture Pensacola, then participated in the 1815 Battle of New Orleans.[166] The most renown earned by the First Regiment was probably during the Mexican War. While commanded by Colonel Jefferson Davis, the unit won fame at the Battle of Buena Vista on February 22-23, 1847.[167] During the War Between the States, the First Infantry Regiment was reorganized in April 1861 and saw action in Kentucky and Tennessee.[168] It disbanded after the war.[169] The First Infantry Regiment was again formed prior to the Spanish-American War in 1898, but never left the country.[170]

The militia in the nineteenth century was largely a dormant organization between military campaigns. Until called to duty at time of war, the Regiment rarely trained, had little or no funding, and was not integrated into the national military force. As hostilities were being anticipated with foreign nations or between American states, the militia members who had been participating at least occasionally in their military duties would volunteer and become the nucleus of a larger force that gathered for the emergency. The National Defense Act of 1916, described above, changed those dynamics. By the time of the

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[163] General Orders from W.B. Shields (Dec. 25, 1806), *in* 1 MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 157, at 275.

[164] 1 MISSISSIPPI TERRITORIAL ARCHIVES, *supra* note 157, at 278.

[165] *Id.* at 281.

[166] IV PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY (Franklin L. Riley ed., 1901), *reprinted in* MULVIHILL, *supra* note 161, at 16-27.

[167] II MISSISSIPPI: COMPRISING SKETCHES OF COUNTIES, TOWNS, EVENTS, INSTITUTIONS, AND PERSONS, ARRANGED IN CYCLOPEDIC FORM (Dunbar Rowland ed., 1907), *reprinted in* MULVIHILL, *supra* note 161, at 29-30.

[168] MULVIHILL, *supra* note 161, at 33-34.

[169] *Id.* at 35.

[170] *Id.* at 34-35.

Great War in 1917, Mississippi's First Regiment and other National Guard units around the country were being transformed into a relatively stable and important component of the national force structure. Reflecting that integration, the designation of the regiment changed. In July 1917, as part of the reorganization of regular army, national guard, and other forces for war in Europe, all Regular Army infantry regiments were numbered from 1 to 100, and National Guard infantry regiments units received designations from 101 through 300.[171] Mississippi's First Regiment became the 155th Infantry[172]

The Army assigned Mississippi's 155th Regiment, along with a regiment from Florida and another from Alabama, to what became known as the "Dixie Division."[173] The 155th went to France but arrived only on September 1, 1918, just two months before the Armistice.[174] When the 155th was mustered out in 1919, it returned to its designation as the First Regiment in the Mississippi National Guard.[175] However, on December 14, 1921, the unit again became the 155th.[176]

The 155th remained a state National Guard force throughout the 1920s and 1930s, meaning that it was not called into federal service during that period. After the start of World War II, the 155th and units from other southern states again formed what became known as the Dixie Division.[177] It initially assisted in the training of other troops, but in July 1944 the Division was sent to the Pacific theater of operations.[178] It fought in battles first in New Guinea and then in the Phillipine campaign at Morotai and Mindanao.[179] The 155th did not return home until December 1945.[180]

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[171] JOHN K. MAHON & ROMANA DANYSH, INFANTRY, PART I: REGULAR ARMY 42-43 (1972).

[172] MULVIHILL, *supra* note 161, at 39.

[173] LINEAGE AND HONORS CERTIFICATE, *supra* note 162.

[174] MULVIHILL, *supra* note 161, at 39.

[175] LINEAGE AND HONORS CERTIFICATE, *supra* note 162.

[176] *Id.*

[177] COLONEL JEFFERSON DAVIS, HISTORY OF THE FIRST BATTLE GROUP 155TH INFANTRY (n.d.), *available at* http://www.ngef.org/custom/1stbatgrp155th.asp (n.d.).

[178] *Id.*

[179] *Id.*

The 155th Infantry was not mobilized for service either in the Korean War or in the Vietnam War. After some intervening reorganizations, in 1973 it became a battalion in the newly formed 155th Armored Brigade.[181] The entire Brigade was mobilized in support of the Desert Shield-Desert Storm operation in 1990-91. It trained at Camp Shelby, Mississippi, in Fort Hood, Texas, and finally at the National Training Center in the Mojave Desert of California. The Persian Gulf War ended prior to the Brigade's being deployed overseas. Instead the soldiers were released back to their civilian lives.

In May 2004, the Brigade again was alerted to possible deployment to the Persian Gulf Region, this time in support of Operation Iraqi Freedom. It was mobilized in August 2004 and deployed to Iraq in January 2005. In the restructuring necessitated by its combat role, this Army National Guard unit had attached to it an active duty Army armored cavalry battalion, an Arkansas National Guard communication company, and a Vermont tank platoon. The Brigade itself fell under the command in Iraq of a Marine Expeditionary Force.[182]

The preceding legal and historical review was intended to lay the fairly complex foundation for understanding the differences between the militia referenced in Mississippi's constitutions and the National Guard of today. When theories on the structure of government were written into the earliest constitutions, the militia experience was one of occasional and uncompensated service by all males. After the Revolution, whatever zeal may have existed for service as Minuteman dwindled, and the culture became one in which militia service was lightly regarded, frequently avoided, and as often ridiculed. This examination should assist the analysis of how the separation of powers provisions for the "militia" can be applied to today's

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[180] LINEAGE AND HONORS CERTIFICATE, *supra* note 162.

[181] U.S. ARMY CTR. OF MILITARY HIST. DEP'T OF THE ARMY, LINEAGE AND HONORS CERTIFICATE FOR HEADQUARTERS AND HEADQUARTERS COMPANY: 155TH ARMORED BRIGADE (June 24, 1994).

[182] As an officer in the Brigade during its mobilization and deployment, I am familiar with this force structure.

Mississippi National Guard.

D. Separation of Powers and the Militia

The separation of powers issue presented by *Doe v. Waller* had four components:

1) Is a member of the militia for that reason a member of any of the "departments of government" as meant by Mississippi's constitution?

2) If militia service does place the soldier in a department, and presumably that would be the executive department, does that violate separation of powers?

3) Even if militia service and holding an office in the legislative or judicial branches are not *per se* inconsistent, are there certain high-ranking positions within the militia that constitute an "office" for purposes of separation of powers? This sub-issue can be rephrased to state that even if a National Guard private may properly serve in the legislature or as a judge, perhaps a general with substantial decision-making authority for the Mississippi National Guard may not.

(4) Does the doctrine of federal preemption alter the answers to the first three questions?

These issues will be discussed in that order.

1. Is the Militia Part of a Department of Government?

a. Conceptual Overview

The suggestion that the militia may not be in any of the three branches of government could appear revolutionary. Surely every part of state government is within one of the three branches? That view is reasonable, but some reflection suggests that this quick answer may be superficial.

The French Baron de Montesquieu was frequently relied upon by this country's Founding Fathers for their understanding of separation of powers.[183] His understanding of the relationship between civil and military office is a useful point of beginning for our efforts to analyze the militia's place within the governmental structure:

> [I]t is a question, whether civil and military employments ought to be conferred on the same person[?] In a republic, I should think, they ought to be joined . . . . In republics it would be extremely dangerous to make the profession of arms a particular state, distinct from that of civil functions . . . .
>
> In republics a person takes up arms only with a view to defend his country and its laws; it is because he is a citizen he makes himself for a while a soldier. Were there two distinct states, the person who under arms thinks himself a citizen, would soon be made sensible he is only a soldier.[184]

Thus,

> [t]o prevent the executive power from being capable of oppressing, it is requisite that the armies, with which it is entrusted, should consist of the people, and have the same spirit as the people . . . .
>
> When once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of things; its business consisting more in action than in deliberation.[185]

The American concept of a citizen-soldier fits well Montesquieu's thoughts on joining civil and military employments. His view encourages citizens to take up arms "for a while" in defense of country. Montesquieu also stated that the army could depend on the legislative power, but "ought to depend on the executive." He also refers to the military's being "entrusted" to the executive. These statements could mean that the military is not properly seen as part of either but is directed and dependent on one or both of those branches. The military is "subordinate" to all civil government, while dependent immediately for its direction on the executive.

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[183] See Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 953-55 for a discussion of Montesquieu's contribution to the Founders' understanding of government.

[184] MONTESQUIEU, THE SPIRIT OF LAWS 418-49, 212 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748).

[185] *Id.* at 212.

There are some activities of a public nature that are clearly outside of the principles of three branches. There is at least one fairly certain example of a state collegial body that represents the people and makes solemn decisions affecting the most fundamental of state laws, but which is not part of the three branches of government. That is a constitutional convention. The plenary power of such a convention called by the legislature has been acknowledged by the Mississippi Supreme Court.[186] The convention is "the repository and executor of the powers of sovereignty" as the agents of the people themselves.[187]

No specific statement could be discovered in Mississippi law regarding the place of the convention and its delegates within the structure of government. However, other states usually have found that the convention is separate from the government existing under the current constitution; as a result, members of any of the three branches of government may also be delegates:

> The people of Maryland from 1776 until today have shown that they concur in the generally prevailing view, which we believe to be sound, that the people retain the sovereign power to rewrite their constitution, that the legislative processes which lead to and assist in the exercise of that power are not a part of the previously bindingly delegated powers conferred on the Legislature by the people, that those who are selected to sit in convention and do the rewriting of the Constitution are selected directly by the people and therefore are the direct agents of the people, rather than agents of the organized government, which is the State. The people also have shown that in their opinion, which we share, the offices which are rationed by the constitution one to a customer or

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[186] Sproule v. Fredericks, 11 So. 472, 474 (Miss. 1892).

[187] *Sproule*, 11 So. at 474.

> the office which may not be held by one who helped create the office are offices which are established by the Constitution or by a law which implements or aids the execution of executive, legislative or judicial functions created by the Constitution, and that an agent of the people who helps create a new constitution does not hold an office within that category.[188]

Somewhat contrarily but also distinguishably, at least one state has held that a constitutional provision that bars holding two "public offices" can prevent an existing office-holder from serving as a constitutional convention delegate.[189] Even there, the delegate was not found to hold a position in any of the three branches of government, only an office that was public.[190]

There is at least a hint that the militia may also be outside the traditional branches of government when Mississippi's current constitution provides that the "military shall be in strict subordination to the civil power."[191] This implies that the militia is at least dissimilar to the remainder of the government. Two different "powers," one military and the other civil, join in the person of the governor as military commander-in-chief. Whatever authority is exercised in the military is subordinate to the civil power.[192] The Mississippi Constitution does not in any other way identify one part of the three branches as being subordinate to other parts.

The categories of power become important in understanding just how the military power fits with the remainder of what government does. At least four great and largely independent realms for authority existed under British law and have continued in the American experience, even if the divisions have been altered. The four distinct dominions of power were civil, maritime, military, and ecclesiastical. A court or magistrate with authority in one arena would not likely have power in another.

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[188] Bd. of Supervisors v. Att'y Gen., 229 A.2d 388, 400 (Md. 1967).

[189] Mahoney v. Murray, 496 P.2d 1120, 1126-27 (Mont. 1972).

[190] *Mahoney*, 496 P.2d at 1126.

[191] MISS. CONST. art. III, § 9.

[192] *Id.*

The Anti-Federalist Papers alluded to the different English courts for each of these authorities by criticizing the Federal Constitution's failure to make jury trial rights more absolute and making the analogy that in England "this mode of [jury] trial was not used in maritime, ecclesiastical, and military court . . . "[193]

Another explanation of these ancient distinctions can be seen in Blackstone's description of the English Parliament as being the true sovereign in that country. In that description, he alluded to the realms of authority over which Parliament reigned:

> It hath sovereign and uncontrolable [sic] authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal . . . .[194]

All maritime matters under the federal constitution were assigned to federal courts acting as courts of admiralty.[195] The remaining three categories of power have remained separate for many purposes throughout this country's history. Thomas Jefferson's writings recognized that at least in pre-Revolution Virginia, offices were civil, military or ecclesiastical:

> By our own act of assembly of 1705, c.30, if a person brought up in the Christian religion denies the being of a God, or the Trinity, or asserts there are more Gods than one, or denies the Christian religion to be true, or the scriptures to be of divine authority, he is punishable on the first offence by incapacity to hold any office or employment ecclesiastical, civil, or military; on the second by disability to sue, to take any gift or legacy, to be guardian, executor, or administrator, and by three years imprisonment, without bail.[196]

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[193] Letter from the Federal Farmer (Jan. 18, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 70, at 320-21.

[194] 1 WILLIAM BLACKSTONE, COMMENTARIES *160.

[195] U.S. CONST. art. III, § 2, cl. 1.

[196] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY 17 (1784), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 79 (Philip B. Kurland & Ralph

One court distinguished civil office from others this way: "'Civil' means: 'Pertaining to a citizen in regard to ordinary affairs; opposed to ecclesiastical or military.'"[197]

Federal and state law continue to recognize that church and military disputes are not normally to be resolved in civil courts. True, ecclesiastical courts in America are not similar to those in England, the latter being a country that did not have a division between the state and the state church, namely, the Church of England headed by the monarch. Nonetheless, the United States Supreme Court applied the doctrine of "ecclesiastical abstention" to conclude that "civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchal polity, but must accept such decisions as binding on them . . . ."[198]

Not only is "ecclesiastical abstention" a current vestige of the far different English relationship between government and the church, it also recognizes that church matters are largely beyond the reach of civil courts because of the First Amendment. The Supreme Court, in 1976, identified one of its decisions from 1872 as first announcing the limited role for civil courts in resolving religious controversies: "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories," the civil tribunals must accept such decisions as final and binding on them.[199] The Court explained the relation between church and court:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and

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Lerner eds., 1987) (quoting Virginia Declaration of Rights, art. 16).

[197] Powell v. United States, 60 F. Supp. 433, 439 (E.D. Va. 1945).

[198] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976).

[199] *Milivojevich*, 426 U.S. at 710 (quoting Watson v. Jones, 13 Wall. 679, 727 (1872)).

> officers within the general association, is unquestioned. All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[200]

Similarly, in Mississippi, a "civil court is forbidden, under the First and Fourteenth Amendments to the United States Constitution, from becoming involved in ecclesiastical disputes."[201] The Mississippi court noted that "abstention includes church-related questions of discipline, faith, rule, custom, or law," which would include questions about the disciplining of a minister.[202] The point being made here is only that civil government and civil courts continue to have limited application to internal church governance.

Military matters are, in large part, similarly assigned to tribunals independent of civilian courts in both the federal and state systems.[203] An entirely separate judicial system exists for criminal offenses that are prosecuted by the military. For soldiers in the United States Army on active duty, courts-martial on criminal charges are held at their military post. An accused may appeal, but it is to the Army Court of Criminal Appeals.[204] Separate criminal appellate courts exist for the Air Force and the Coast Guard, as well as one called the Navy-Marine Corps Court. Appeals from their decisions are taken to

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[200] Watson v. Jones, 80 U.S. 679, 728-29 (1872).

[201] Mallette v. Church of God Int'l, 789 So. 2d 120, 123 (Miss. Ct. App. 2001).

[202] *Mallette*, 789 So. 2d at 124. On the initial appeal, the abstention doctrine was defined as a bar to judicial scrutiny when church officials "apply church doctrine and exercise governing authority," but that protection did not extend to a minister's comments, even from the pulpit, that were outside those categories. Mallette v. Church of God Int'l, No. 96-CA-00161-COA, slip op. at 6 (Miss. Ct. App. Dec. 16, 1997). Neither the federal nor the state constitution "provides religious organizations with blanket immunity from defamatory statements;" since the blanket that does exist "may or may not be of the size to cover all that occurred here," a reversal of summary judgment and a remand were necessary for further fact-finding. *Id.* at 6-7.

[203] At least once, the opposite problem allegedly existed, namely, that the military controlled civilian courts. Such a situation is hardly unknown in the world, but fortunately its occurrence in the United States is almost impossible. In the upheavals after the Civil War, a justice of Mississippi's highest court declared in

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a habeas corpus ruling that the federal Civil Rights Act of 1866 violated the federal constitution because the Thirteenth Amendment was inadequate authorization for that Act. Ex parte Lewis, WEEKLY CLARION (Jackson, Miss.), Oct. 4, 1866, at 2 (Miss. Oct. 4, 1866); *see also Decision of Chief Justice Hardy, Declaring the Civil Rights Bill Unconstitutional*, N.Y. TIMES, Oct. 26, 1866, at 2 (excerpting about two-thirds of the lengthy opinion). This single-justice opinion was not officially published. A black former Union soldier named James Lewis had been convicted in Madison County under an 1865 state statute that prohibited only "freedmen, free Negroes and mulattoes" from possessing firearms; the 1866 Civil Rights Act gave to such individuals the "full and equal benefit of all laws" of a state. Ex parte Lewis, WEEKLY CLARION (Jackson, Miss.), Oct. 4, 1866, at 2 (Miss. Oct. 4, 1866). The *Lewis* opinion found that the Thirteenth Amendment freed slaves but did not create a basis for granting full rights as citizens; adoption of the Fourteenth Amendment two years later mooted that argument. *Id.* Apparently and unsurprisingly, the *Lewis* decision had no impact on the federal military leadership then in control of the state. The audacity of the decision troubled some who agreed with it: "The truth well spoken is proper, but even the truth can be officiously spoken out of place and do great harm." HINDS COUNTY GAZETTE (Raymond, Miss.), Oct. 19, 1866, at 1.

The judge who heard the petition for the writ, Alexander Handy, resigned in frustration a year later and said that the judiciary's powers were "held and exercised in subordination to the behests of a military commander." A.H. Handy, *Resignation of Judge Handy*, AMERICAN CITIZEN (Canton, Miss.), Oct. 19, 1867, at 1. Handy's two judicial colleagues also resigned. The federal military commander appointed three replacements and also filled subsequent high court vacancies until Mississippi was readmitted to the union in 1870. JOHN RAY SKATES, JR., HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948, at 27-28 (1973). The lingering bitterness from those years of conflicts between some state leaders and the federal military led to rhetorical venting even thirty years later. The judicial successors to Justice Handy, once the Democratic Party was again firmly in control of all levels of state government, declared that all opinions of the state's highest court during the period of military-appointed judges were void. Lusby v. Kansas City, Memphis & Birmingham R.R. Co., 19 So. 239, 242 (Miss. 1895) ("The opinions found in that volume [42 Miss.] are the utterances of a tribunal appointed by the military satrap, who then ruled in a prostrate commonwealth, and have no other binding authority upon us than that each case therein must be regarded as *res adjudicata.*").

[204] 10 U.S.C. § 866 (2000).

the five civilian judges on the United States Court of Appeals for the Armed Forces.[205] Similarly, prosecutions under the Mississippi Code of Military Justice are totally outside of civilian court.[206] The final court of review is the Mississippi Court of Military Appeals, not the Supreme Court.[207]

What this means is that if a soldier, while in military status, commits a crime such as murder and is court-martialed, military procedures govern the charging, trial, appeal and sentence. What has been kept constant in the varying provisions adopted through the years is that federal and state military procedures, not those of civil courts, independently exist and are final over a wide swath. The state military's authority is still subject to the constitution's command that the military be subordinate to the civil power. That reality is clear from the fact that it is the state legislature that created the rules for how the military governs itself.

b. *Mississippi Statutes and Experience*

The militia's initial place within Mississippi's government was established by these provisions in the 1817 constitution:

> That the general, great and essential principles of liberty and free government may be recognized and established, WE DECLARE:
>
> . . . .
>
> . . . That no person shall, for any indictable offense, [sic] be proceeded against criminally by information, except in cases arising in the land or naval forces, or the militia, when in actual service, or by leave of court, for misdemeanor in office.[208]

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[205] *Id.* § 867.

[206] MISS. CODE ANN. § 33-13-1 to -627 (2000).

[207] *Id.* § 33-13-417. The court has only heard one appeal, that of the court-martial of The Adjutant General Arthur James Farmer in 1991. The court upheld the dismissal of the charges because of unlawful command influence by the governor. The opinion was not officially published, but the text has recently appeared in this *Journal* at State v. Farmer, 72 MISS. L.J. 806 (2002) (Miss. Mil. App. 1991).

[208] MISS. CONST. of 1817, art. I, § 12.

> . . . No standing army shall be kept up without the consent of the legislature; and the military shall, in all cases and at all times, be in a strict subordination to the civil power.[209]
>
> . . . .
>
> . . . No Judge of any Court of Law or equity, Secretary of State, Attorney General, Clerk of any Court of Record, Sheriff, or Collector, or any person holding a lucrative office under the United States (the office of post master excepted), or this state shall be eligible to the General Assembly: *Provided*, That officers in the militia, to which there is attached no annual salary, or the office of Justice of the Peace, or of the quorum, shall not be deemed lucrative.[210]
>
> . . . .
>
> . . . [The governor] shall be commander-in-chief of the army and navy of this state, and of the militia, except when they shall be called into service of the United States.[211]
>
> . . . .
>
> . . . The General Assembly shall provide by law, for organizing and disciplining the militia of this state in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States, in relation thereto.[212]
>
> . . . Officers of the militia shall be elected or appointed in such manner as the Legislature shall, from time to time direct; and shall be commissioned by the Governor.[213]
>
> . . . Those persons who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service.[214]
>
> . . . The Governor shall have power to call forth the

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[209] *Id.* § 24.

[210] *Id.* art. III, § 27.

[211] *Id.* art. IV, § 5.

[212] *Id.* § 1. Article IV concerns the executive; inserted at the end of twenty-five consecutively numbered sections discussing the governor is a militia appendix, which does not contain a new article number but does contain new sections 1-4.

[213] *Id.* § 2.

[214] *Id.* § 3.

> militia to execute the laws of the state, to suppress insurrections, and repel invasions.[215]

By far the most specific, relevant provision for the original understanding of the placement of the militia within a branch of government is that the four sections on the militia appear at the end of the article on the executive branch. Certainly, the governor, as commander-in-chief, was the principal officer of the executive branch. That the executive branch article was the most convenient location for the militia clauses is a possibility, without the constitutional framers contemplating that the militia members themselves were part of the division of the civil government into three departments. To use Montesquieu's earlier quoted word, the militia might be seen as only being "entrusted" to the executive.[216] Suggestive also is that the militia provisions comprise a separate section, separately numbered, at the end of the executive article and are not incorporated directly into the article.

There is little in the constitution to answer whether the military was considered to be part of the executive branch, even though its commander-in-chief certainly was. The military power was always to be subservient to the civil. That does not answer whether the military was the agent but separate from the civilian power, or was the military a component of the executive branch? The legislature passes laws controlling the state militia; the governor commands it and appoints many of its officers. To direct this public force is almost certainly an executive power. Our issue is whether those who carry out the direction are themselves in the executive branch.

Other considerations include the fact that the militia can be used to enforce the laws, a power that has been interpreted to mean that they can execute arrest and search warrants.[217] Until a specific federal statute was adopted in the post-Reconstruction era to bar the use of federal troops to enforce state criminal laws, United States Army soldiers could be empowered to enforce state criminal laws.[218] It is unlikely that the federal soldiers became part of the state executive branch as a result. Whether state militia are executive branch officials is also not answered by the constitution's permitting them to exercise executive functions such as law enforcement, though they may be agents for that branch.

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[215] *Id.* § 4.

[216] MONTESQUIEU, *supra* note 184, at 148-49, 212.

[217] MISS. CONST. art. IX, § 217; State v. McPhail, 180 So. 387 (Miss. 1938).

The militia concept of "citizen soldiers" requires that individual members of the civilian community are subject to occasional military obligations to protect themselves and their neighbors from invasion or insurrection. To say that members of the militia, while on military duty, are in the executive branch would mean, to use the ancient Roman story of Cincinnatus, that when the farmer left his plow he joined the executive branch of government, then later at battle's end left that department of government and returned to his plow.

Were militia service to be considered to occur within the executive branch of government, when that service begins and ends for an individual is important. Since all males of certain ages had to be enrolled in the militia, did the enrollment itself put them in the executive branch until their eligibility ended at age forty-five? Being a militiaman was not just an occasional status, but a constant one by enrollment. That category of people were also the bulk of the voters, since only white males could vote. If the militia were in the executive branch of state government, then potentially almost all voters were in the executive branch. The concept of being in a branch distorts when applied to the militia.

In conclusion, members of the militia, commanded by the chief of the executive branch, are not likely themselves in any branch of government. The same conclusion applies to members of the present National Guard, even though its soldiers are a self-selected few as opposed to being the mass of adult males. For all the regularity, structure, and personal financial benefits, the citizen's service remains of a military nature. While serving on active duty in either the frontier militia or the later National Guard, the soldier has always been subject to military discipline and command structure.

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[218] Posse Comitatus Act, 18 U.S.C. § 1385 (Supp. 2004); United States v. Allred, 867 F.2d 856, 870 (5th Cir. 1989).

The changes from the militia to the National Guard do not seem to affect the nature of state military service in ways relevant to the constitution. Wherever the militia originally was located in the government, there the National Guard likely is also.

The next consideration is whether there was any prohibition of a member of the judicial or legislative branches from serving in the militia. There is an overlap between the just concluded evaluation and this next question. For separation of powers issues, it would not matter whether the militia is not in any branch of government at all, or instead whether service in the militia was an understood exception to separation of powers concepts even if it is in the executive branch. In either of those two events, a legislator or judge could serve in the militia.

2. Does a Judge Violate Separation of Powers to Serve in the Militia?

The premise for the next part of the analysis is that the militia *may* structurally be located within the executive branch. Already discussed is the language of pure separation that appeared in early constitutions, followed immediately within the organizing provisions of the document by many exceptions. The point for examination here is whether the constitutional framers indicated with some clarity that militia service was consistent with service in the judicial or legislative branches.

To be mentioned first is that Mississippi Code section 33-1-9 specifically finds it to be compatible to accept and hold a commission in the militia and hold any civil office.[219] That law was adopted in 1950.[220] The problem raised by *Doe v. Waller* is whether that statute is constitutional. Thus section

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[219] MISS. CODE ANN. § 33-1-9 (2000).

[220] Act of Apr. 13, 1950, ch. 442, 1950 Miss. Laws 548. (codified as amended MISS. CODE ANN. § 33-1-9 (2000)).

33-1-9 is a good place to start, but it is not possible to end there. Instead, an inquiry into separation of powers requirements under the state constitution is demanded.

a. Mississippi Constitutions and Statutes

The 1817 constitution spoke of separate powers being assigned to separate departments, and that no department could exercise the powers of one of the others. It also then mixed some of the powers in the obvious ways, including giving the governor a role in legislation by allowing a veto,[221] by giving the legislature a role in the judiciary by providing for election of judges by the legislature,[222] and by giving the executive branch influence in the legislative by making the lieutenant governor the presiding officer of the senate and allowing him to participate in senate debate.[223]

A fuller understanding of the functioning of the militia comes from reviewing contemporaneous statutes. As mentioned above, territorial provisions that were not inconsistent with what the 1818 legislature provided in its narrower-focused militia measure were effectively re-enacted in 1818. Included in those re-enacted provisions was legal exemption for legislators and judges, but with all individuals exempted having the right to volunteer and serve.

This means of adopting laws—adding some new provisions while retaining everything consistent—created almost immediately a need for some coherence to be brought to the new state's laws. George Poindexter, described as the chief architect of the 1817 constitution, became the state's second governor in 1820. Within two weeks of his inaugural address, the governor was encouraging the legislators to appoint a three-person commission to revise and consolidate the state's statutes, with one purpose being "to reduce into one, all the laws on the same subject . . . ."[224] The 1821 legislature passed a measure to have this task performed, but it gave the governor himself the responsibility of performing the codification.[225] Poindexter finished the Code after he left office.[226] The legislature adopted it in June 1822, with some revisions in January 1823.[227]

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[221] MISS. CONST. of 1817, art. IV, § 15.

[222] *Id.* § 17.

[223] *Id.* §§ 18-19.

[224] Governor George Poindexter, Message Read by Personal Secretary to House

The 1818 Act and Poindexter's Code, as officially promulgated by the 1822-23 legislators, could be viewed as persuasive evidence of what the 1817 constitutional provisions on separation of powers meant to the drafters of those provisions. The United States Supreme Court has looked to the actions of the First Congress to assist it in divining constitutional meaning. In a significant separation of power case, *Bowsher v. Synar*,[228] the United States Supreme Court held that decisions of the First Congress provide "contemporaneous and weighty evidence" of the meaning of the Constitution.[229]

There were forty-seven delegates to the 1817 Mississippi constitutional convention in Washington, near Natchez.[230] Of those, thirteen then served in the 1818 legislature.[231] The 1823 Code was prepared by the chairman of the constitution's drafting committee. Thus, the 1818 Act and Poindexter's Code

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and Senate (Jan. 20, 1826), *in* 1820 MISS. JOUSE J. 63-65. The governor was inaugurated January 5, 1820. *Id.* at 63-65; *see also* INAUGURAL ADDRESSES OF THE GOVERNORS OF MISSISSIPPI 1817-1890, at 6 (Robert F. McArthur & Dorothy I. Wilson eds., 1981) (providing text of Governor Poindexter's inaugural address).

[225] REV. CODE MISS. [POINDEXTER'S CODE] ch. 1, 2 (1823).

[226] *Id.* ch. 3.

[227] *Id.* chs. 4, 5.

[228] 478 U.S. 714 (1986).

[229] *Bowsher*, 478 U.S. at 723-24 (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *see also* Harmelin v. Michigan, 501 U.S. 957, 980 (1991) ("Actions of the First Congress . . . are of course persuasive evidence of what the Constitution means.") (citations omitted); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning").

[230] Winbourne Magruder Drake, *The Framing of Mississippi's First Constitution*, XXIX J. MISS. HIST. 301, 305 (1967).

[231] Comparison of list of 1817 delegates found in Dunbar Rowland, *Mississippi's First Constitution and Its Makers*, *in* PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 81-82 (Franklin L. Riley ed., 1902), with the list of the first legislators in II MISSISSIPPI COMPRISING SKETCHES OF COUNTIES, TOWNS, EVENTS, INSTITUTIONS, AND PERSONS, ARRANGED IN CYCLOPEDIC FORM 74-75 (Dunbar Rowland ed., The Reprint Co. 1973) (1907).

both bring the imprimatur of constitutional expertise.

No provision relevant for separation of powers regarding the militia was specifically enacted by the 1818 legislature, but older provisions were re-enacted. Those provisions quoted above provided that all white males between the ages of eighteen and forty-five had to become part of the militia. Certain categories of individuals were exempt, largely it would appear because their work was too important or their skills too hard to replace if militia duty would be frequently calling them away. Teachers, post-masters, ferry operators, and some governmental officials were exempt from enrolling. However, a provision not yet mentioned is that anyone who was exempt from enrollment could nonetheless volunteer in case of emergency and be accepted by the governor into the militia.[232] No constitutional bar apparently existed, or at least the 1818 legislators saw no immediate reason to address the potential problem.

Turning now to Poindexter's 1823 Code, the same practical, as opposed to constitution-based, exemptions existed. Poindexter was empowered by the legislature to codify the state's laws and to make suggestions for changes. According to a message that he sent the legislature after he had served a year, he found the militia laws to be objectionable in several ways, though not on separation of powers grounds.[233] When he submitted his proposed Code in May 1822 he prepared "additional bills . . . [that] are 'necessary and proper to complete the code of statute laws of this state' . . . ."[234] The revisions and additional bills were to be examined by the judges of the supreme court and the attorney general, who would recommend to the general assembly whether to adopt them.[235] The records that have been discovered do not allow a reconstruction of what Poindexter submitted and whether there were changes before adoption. There is no evidence that Poindexter was uncomfortable with the militia law that is in his Code. The Militia Act was adopted on June 20, 1822, and became part of the published Code the following year.[236]

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[232] STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 105, at 342-43.

[233] 1821 MISS. HOUSE J. 14. Poindexter complained in his message about the disorganized condition of the militia laws. He described generally the "imperfections" that are obvious to those "who are concerned in the arduous duty of enforcing, order, discipline and subordination in the Militia."

[234] REV. CODE MISS. [POINDEXTER'S CODE] *Preface* i (1823).

[235] *Id.* ch. 2.

Several rather informative provisions in Poindexter's work provide his understanding of the effect of the separation of powers rules on militia service. For example, one section *requires* "actual service" by members of the legislative branch.

> The commanding officer of each company, shall from time to time enroll able-bodied free white male citizens between the ages of eighteen and forty-five years, and within the limits of his command . . . . *Provided, That the said commanding officers of companies shall not enroll for the purpose of muster, or require military service* from those exempted by the laws of the United States, nor from the following persons, *viz*: *Judges of the state,* the treasurer, the auditor of public accounts, the secretary of state, the lieutenant governor, the attorney general, regularly licensed ministers of the Gospel, according to the rules of their sect, teachers and students in all colleges and in the several academies, justices of the county court and keepers of public ferries and toll bridges; *Provided also*, *That the members of the general assembly*, clerks of courts, sheriffs, coroners, keepers of weights and measures, assessors and collectors of taxes, inspectors of flour and other provisions, practising physicians, *justices of the peace*, keepers of the public jails, keepers of the public mills, and commissioners of roads, *shall be and they are hereby exempt from ordinary militia duty, but not from draft for actual service.*[237]

Various explanations other than constitutional ones arise for the distinction between different officials. Judges and statewide officials had continuing civil duties that were not shared with anyone else. On the other hand, members of the General Assembly had only a part-time position in a collegial body and, thus, the absence of some of them would not be as disruptive.

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[236] Act of June 26, 1822, 1822 Miss. Laws 386.

[237] REV. MISS. CODE [POINDEXTER'S CODE] ch. 95, § 11 (1823) (emphasis added).

They would not have to perform the potentially frequent militia duties of patrol and parade since that would unduly interfere with their public offices, but if needed to fight they were subject to call.

Justices of the Peace were subject to military duty, but higher level trial judges were not. That may have been due to the lower prestige, the sense that most justice court judges were not especially well-trained judges and thus more easily replaced, and other reasons including their method of compensation as is discussed below. Regardless, the office of Justice of the Peace was created in the article on the judiciary and undeniably was part of the judicial branch.[238] By proposing such language, Governor Poindexter, formerly the principal participant in the constitutional convention, apparently agreed that militia duty by members of the general assembly and by the lowest-ranking judges was consistent with separation of powers.

Of relevance as well are some contemporaneous events in an adjacent state because they reflect the understanding of these principles at the time of the state's first constitution. Kentucky, the state whose separation of powers provisions were identical to those in the 1817 Mississippi Constitution, responded to the War of 1812 by removing all the exemptions from their militia statute except for ministers of the Gospel.[239] Neither in Mississippi nor in Kentucky did the strong separation of powers language prevent requiring members of the judiciary or legislature to be in the militia. This Kentucky statute suggests a general early nineteenth century understanding of the nature of militia service.

Before leaving the language of the 1817 constitution, one final provision previously quoted should be examined.[240] This language of Article III, section 27, is the only direct statement prohibiting a member of the militia from serving in another governmental position. It disqualifies a member of the militia from serving in the general assembly only if that militiaman received "an annual salary." Very few members of the militia received an annual salary, if that meant a salary for a full-time position. The Poindexter Code provided that members of the militia would receive the pay that would be received by "United States troops . . . ."[241] Being paid for each time called into active service, for a muster or actual duty, would unlikely be considered an "annual salary." As is discussed in greater detail later, there often was no money to pay militiamen despite this statutory language. The administrative head of a state's militia since the 1792 Militia Act has been the adjutant general. Poindexter's Code provided an annual salary for him, to be paid quarterly out of the state treasury.[242] Thus the adjutant general might not have been able to serve in the general assembly but not because of the two separation of powers sections.

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[238] MISS. CONST. of 1817, art. V, § 8.

[239] Act of Feb. 13, 1813, ch. 90, § 9, 1812 Ky. Laws 101, 103. My thanks are given to Professor Edward Skeen of University of Memphis for providing this information to me.

[240] MISS. CONST. of 1817, art. III, § 27. *See supra* text accompanying note 210.

This provision in the 1817 constitution did not bar service in the judicial or executive branch if the person was serving in another lucrative position; the prohibition was solely for the general assembly. Thus, the adjutant general and any other member of the militia who was paid an annual salary would be eligible to serve as a judge or a member of the executive branch unless some other prohibition applied. Separation of the militia from the civil departments was not mandated.

It is unnecessary to discuss the intervening constitutions. The final review of provisions will be of those in the 1890 constitution. This constitution continued the assertion of strong separation of powers principles while also leaving open the question of whether militia service was compatible. Those that appear applicable to the militia follow:

"The military shall be in strict subordination to the civil power."[243] This general recognition of the control by the civilian authorities over the military does at least suggest that the

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[241] REV. CODE MISS. [POINDEXTER'S CODE] ch. 95, § 49 (1823).

[242] *Id.* § 21.

[243] MISS. CONST. art. 3, § 9.

"civil power" may be the three branches of government, which hold away over the separate military. It may not mean that, however.

"The term of all officers shall be for some specified period."[244] Military officers have various restrictions on their service, but not what would commonly be considered "terms." This suggests that a military officer is not an officer as intended by this section of the constitution.

"All able-bodied male citizens of the state between the ages of eighteen and forty-five years shall be liable to military duty in the militia of this state, in such manner as the legislature may provide."[245] This recognizes that there is an "unorganized militia" to which all male citizens between the ages of eighteen and forty-five belong. Therefore, being subject to this provision, as are all males in public office who are less than age forty-five, is not sufficient to disqualify a person from being a judge or legislator. The exemptions were not stated in the constitution but by statute. If any member of the judicial or legislative branches enrolled for the unorganized militia and did not thereby join another branch of government, it is illogical to conclude that the person entered the executive branch if summoned by the governor for temporary emergency duty. It was clear in the 1817 constitution that unless a person received an annual salary as a member of the militia, no bar to service in state office arose. If a bar existed by 1890, it would have to come from something other than the mere words about separation of powers in Article I, sections 1 and 2.

What these 1890 provisions mean, as with those in the 1817 constitution, can begin with an understanding of what the next legislature did with enabling legislation. At the 1890 constitutional convention, there had been 134 delegates. Twelve of the delegates who signed the constitution served in the 1892 legislature as did three others who had refused to sign.[246] The

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[244] *Id.* art. III, § 20.

[245] *Id.* art. IX, § 214.

[246] Comparison of the list of delegates to the 1890 constitutional convention that appears following MISS. CONST., art. XV, § 285, to the lists of legislators

1890 equivalent to George Poindexter, the leading figure of Mississippi's first constitutional convention, did not shift to the legislature in 1892. Solomon S. Calhoon had been president of the convention; he remained in private law practice in Hinds County until he was appointed to the Supreme Court in 1900. United States Senator James Z. George was perhaps the most important advocate for holding the 1890 convention, and then he played a significant role throughout its proceedings.[247] He remained in the federal legislature. Prominent Brookhaven attorney Robert H. Thompson was chairman of the Legislative Committee which drafted the separation of powers provision. Thompson did not join the legislature, but five of the twenty members of his committee did.[248] To the extent there was an appreciation in the convention of what the delegates were doing in adopting the revised separation of powers provision, that understanding had some representation in the next legislature.

The first legislature after the 1890 Constitution provided that "[a]ll able-bodied male inhabitants over the age of eighteen and under the age of forty-five years, and not exempted by law, are liable to military service."[249] Exempted was the normal listing of significant occupations such as ministers of the Gospel, physicians, telegraph company employees, and keepers of public ferries, and also "all state and county officers, executive, legislative, and judicial . . . ."[250]

These exemptions prevented mandatory service but did not speak to voluntary service. The present version of the statute provides that the militia consists of people in the right age and sex categories who are not exempt by federal or state law, "together with all other able-bodied persons who shall voluntarily enlist or accept commission, appointment, or assignment

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that appear in 1892 MISS. HOUSE J. 3-5 and 1892 MISS. SEN. J. 3-4.

[247] James P. Coleman, *The Mississippi Constitution of 1890 and the Final Decade of the Nineteenth Century*, *in* II A HISTORY OF MISSISSIPPI 8, 12 (Richard Aubrey McLemore ed., 3d prtg. 1981).

[248] *Compare* JOURNAL OF THE PROCEEDINGS, *supra* note 32, at 21 (listing committee appointments), *with* 1892 House and Senate Journals.

[249] MISS. CODE ANN. § 2866 (1892).

[250] *Id.* § 2867.

to duty therein . . . ."[251] Thus an exemption may be waived. Though there are statutory differences, this approach is similar to the former statutes for jury service. One case distinguished the categories of individuals who by statute were made "incompetent" to serve as jurors, such as "common gamblers or habitual drunkards," and those who merely had exemptions such as state offcials.[252] The latter had the right to serve on juries but could not be forced to do so.

b. Mississippi Experience and Practices

Previously mentioned has been the United States Supreme Court's willingness to consider actions of the First Congress in understanding the meaning of the Federal Constitution. Besides just legislation, though, the Court has examined other actions of those who adopted the Federal Constitution. For example, a suit was brought to challenge the opening of a state's legislative sessions with prayers. The federal Supreme Court found that such actions were consistent with the First Amendment and relied in part on the fact that the very Congress that prepared the First Amendment had opened its sessions with prayer:

> On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was

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[251] MISS. CODE ANN. § 33-5-1 (2000). The statute does not limit the militia to male citizens, while constitutional section 214 does. *Compare* MISS. CONST. art. 9, § 214 *with* MISS. CODE ANN. § 33-5-1 (2000).

[252] Robinson v. State, 173 So. 451, 452 (Miss. 1937) (citing what became MISS. CODE ANN. §§ 13-5-1 & 13-5-23 (1972)). Section 13-5-23 has now been amended to remove the exemptions for public officials and various occupations. Act of March 13, 1990, ch. 360, 1990 Miss. Laws 116.

adopted even before the State attained statehood.[253]

Therefore, it would be instructive to examine the militia service of delegates to the 1817 and 1890 conventions. The 1817 drafting committee chairman, George Poindexter, did more than participate in drafting constitutional language. He had been a Mississippi territorial judge, a territorial delegate to Congress, and was a lawyer. In 1806, when Poindexter had just been elected to the territorial legislature, he was a captain in the "Mississippi Blues" militia unit. He was ordered into service as aide-de-camp to a major who was leading troops into Louisiana to engage a threatening Spanish force.[254] In 1814-15, Poindexter was the territorial judge. As the British were nearing New Orleans, despite being exempt, he volunteered to join Andrew Jackson's forces there. He was made aide-de-camp to the commander of Tennessee troops and just left his court while it was in session. He was at the battle of New Orleans, was wounded in early action, and in his later political career had to deny that he did not run scared into the city while the battle was raging, but he went in order to get medical attention only to return after the fight was won. After the battle, he returned to his duties as territorial judge.[255] His militia service after statehood is unknown.

George G. Dillard was a member of the 1890 convention's Legislative Committee that prepared the separation of powers provision. He was at that time serving in the militia and also was in the legislature. Dillard served as a state senator from Noxubee County from 1884-1892, and in 1890 had risen to the rank of lieutenant colonel in the Second Infantry Regiment, headquartered in Columbus.[256] His Guard, legislative, and convention delegate service all overlapped.

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[253] Marsh v. Chambers, 463 U.S. 783, 788-89 (1983) (footnotes omitted) (citations omitted).

[254] Smith, *supra* note 27, at 50, 64.

[255] *Id.* at 44-46.

[256] BIENNIAL REPORT OF THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI FOR THE TERM ENDING JANUARY 1, 1890, at 15 (1890) [hereinafter BIENNIAL REPORT 1890].

Other examples exist. Only haphazard information exists of nineteenth century militia service, so the number of examples is impossible to determine. The lengthy rosters that have been discovered from the nineteenth century are not of Guard membership, but instead list those serving on active duty, such as those who volunteered in 1898 for service in the Spanish-American War.[257] Therefore, when the individuals next mentioned enlisted or were commissioned, and when their service ended, cannot always be determined.

1) John A. Quitman. He volunteered in 1821 in Ohio, the same year that he became a lawyer. He joined the Mississippi militia by 1823, which was not long after moving to Natchez in December 1821. He was elected to the legislature in 1827, was a chancellor from 1828-1835, state senator 1835, declined appointment to High Court of Errors and Appeals in 1836 and 1840, became a militia Major General in 1837, served in the Mexican War, and was governor from 1849-51.[258] Thus, at least for twenty-five years, his military and elective officer service overlapped.

2) James T. Harrison, Jr. By 1889, he was a major and the assistant judge advocate general for the First Brigade in Columbus; in 1893, he became a colonel and was the judge advocate general at the state headquarters.[259] He served in the state senate from 1892 until 1900 and was senate president pro tempore for his last term beginning in 1896. In the 1899 election he was chosen lieutenant governor, and served one term. He apparently resigned from the national guard in 1896.[260] Thus for at least four years he was a senator and also in the Guard.

3) William Calvin Wells, Jr. Around 1900, Wells joined the National Guard. He was the assistant judge advocate of the

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[257] BIENNIAL REPORT REPORT OF THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI FOR THE YEARS 1898 AND 1899, at 76-237 (1900) [hereinafter BIENNIAL REPORT 1898]; 1904 Miss. Reg. 160 (1904).

[258] ROBERT E. MAY, JOHN A. QUITMAN: OLD SOUTH CRUSADER 19-199 (1985).

[259] BIENNIAL REPORT 1890, *supra* note 256, at 13; Harrison subject file, Mississippi Department of Archives and History.

[260] Harrison subject file, Mississippi Department of Archives and History.

Mississippi National Guard when he was elected to the state house of representatives in 1903. He served in the house from 1904-1908.[261] "Prior to World War I, Mr. Wells was a member of the National Guard for 15 years."[262] He eventually became a colonel on the staff of the "commanding General and was Judge Advocate General of Mississippi."[263]

There are many examples of Mississippians in the twentieth century who served simultaneously in the National Guard and in state judicial or legislative office. As distance from the adoption of the present constitution increased, those individuals would not have been considered uniquely knowledgeable about its meaning. Some of the more recent and best known individuals in this category are Chief Justice Edwin Pittman, former legislator Wayne O. Burkes, former state representative John Hampton Stennis, and former circuit judge E. A. (Bebe) Turnage. All had lengthy careers in the National Guard ending at the rank of at least brigadier general, with that overlapping their civilian office-holding. During Governor William Waller, Sr.'s term, Turnage served as The Adjutant General after he left the judiciary.[264]

c. *Experience of Other States and Federal Government*

Other states have faced these questions. Generally the analysis is rather basic: is military service incompatible with civilian office? No universally applied standard has been created to make that determination. Generally, courts "have contented themselves with a discussion of . . . particular facts which, in individual instances, have been looked upon as creating incompatibility."[265] Those issues often are resolved on the basis of whether serving in both offices involves drawing two full-time salaries, requires them to perform separate duties at the same time, and other matters of undue overlapping of obligations and remunerations. What other states have done will not be examined at length since the concern here is a careful look at the requirements of Mississippi separation of powers principles. Many of the opinions from other states arose during wartime. The current *Doe v. Waller* case in Mississippi did as well, namely, the war against terrorism.

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[261] 1904 Miss. Reg. 536-37 (1904); McCain, *supra* note 260, at 144; 2 William D. McCain, The Story of Jackson: Biographical Sketches of the Builders of the Capital of Mississippi 144 (1953).

[262] McCain, *supra* note 261, at 144.

[263] *Id.*

[264] This is based on the author's familiarity with all four men; more formal citations of authority exist but have not been searched. Additional examples of military service by public officials were discovered in historical research conducted by the chairman of the Department of Political Science at Belhaven College. Westley F. Busbee, "A History of Service by Public Officials in Mississippi's Militia and National Guard," attached as Exh. B, Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (June 28, 2002), *Doe v. Waller*, Chancery Court, First Judicial District of Hinds County, Cause No. G2002-208S/2.

An early Kentucky case that interpreted that State's separation of powers provisions, identical to what later was adopted in Mississippi, found the office of county sheriff and that of a justice of the peace to be incompatible.[266] The incompatibility arose because powers of the executive and of the judicial department of government were being exercised by the same person.[267] Though no specific remedy for holding incompatible offices was set out in the Kentucky Constitution, a 1792 statute had provided "that any person holding any office, who shall accept of another, which by the constitution is incompatible with his former office, such former office shall be thereby vacated."[268] It was not until the 1890 Constitution that Mississippi adopted a provision that an acquiring of an office in one branch by someone who already held an office in another branch, vacated the first office.[269]

This Kentucky case did not pose the question of whether service in the militia is holding an office for purposes of separation of powers analysis. A Texas case had that precise issue, but the constitutional provision was also quite precise.[270] The Texas Constitution provided that "no person shall hold or exercise, at the same time, more than one civil office of emolument. . . . "[271] The Court found that use of the word "civil" was used to distinguish offices that were military.[272] Consequently, service in a militia office was not inconsistent with holding an office in one of the three branches of state government. A later decision relied on this precedent to hold that a state district judge could simultaneously serve as a captain in the National Guard.[273]

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[265] Annotation, *Incompatibility of Offices or Positions in the Military, and in the Civil, Service*, 26 A.L.R. 142, 143 (1923), as supplemented by Annotation, 132 A.L.R. 254 (1941); and Annotation, 140 A.L.R. 1499 (1942).

[266] Richardson v. Justices, 1802 WL 836, at *1 (Ky. App. Jun. 3, 1802).

[267] *Id.*

[268] *Id.*

[269] MISS. CONST., art. I, § 2.

A justice on the Utah Supreme Court was called to active duty as a major in the United States Army as a reserve officer.[274] He was found not to have violated a provision which provided that "[n]o person, while holding any office under the United States' government, shall hold any office under the State Government of Utah . . . ."[275] That "was designed to prevent practices which would tend to undermine the stability of our state government, and it was aimed at political office seekers, particularly those who might seek to draw two full time salaries from positions incompatible and impossible to perform simultaneously without neglecting performance of the duties of the state office."[276]

What has caused courts to find incompatibility is for a person called to full-time military service to continue to draw a state salary as well. A Tennessee county judge called to active duty in the Army was found to hold an office of trust or profit and could not continue in the state judgeship.[277] The current federal law on this question of salaries will be discussed below.

The cases from other states have varying results, explained by their facts, their operative statutory and constitutional provisions, and perhaps the varying philosophies of the appellate courts. The greater number of cases as expressed in the cited annotations appear to uphold this form of dual service. Interpretation of the Constitution, though, is not just a matter of majority opinion.

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[270] *Ex parte* Dailey, 246 S.W. 91 (Tex. Crim. App. 1922).

[271] *Id.* at 92 (internal quotations omitted).

[272] *Id.* at 93.

[273] Texas Nat'l Guard Armory Bd. v. McCraw, 126 S.W.2d 627, 631-32 (Tex. 1939).

[274] Critchlow v. Monson, 131 P.2d 794, 796 (Utah 1942).

[275] *Id.*

[276] *Id.* at 799.

[277] Frazier v. Elmore, 173 S.W.2d 563, 566-68 (Tenn. 1943).

Finally, in this review of examples of simultaneous military and legislative or judicial service, the experience of three national leaders, one from each of the national branches of government, might give a larger context.

As a young man Harry Truman joined the Missouri National Guard in 1905.[278] He served in World War I and remained in the Guard once the war was over.[279] While in the Guard, he served as a Missouri county judge from 1922-1924, and then again in 1926-1934.[280] Henry Cabot Lodge, Jr., of Massachusetts was both a United States Senator and an officer in the Army Reserves during World War II.[281] He would serve on military orders for a time, then return to the Senate.[282] Lodge finally resigned from the Senate and went on active duty.[283] United States Supreme Court Justice Frank Murphy served on the Court from 1940-1949.[284] During World War II, he became a lieutenant colonel of Infantry, trained at Ft. Benning in Georgia, and performed military duties while remaining on the Court.[285]

What has been discussed so far is militia service by the generic soldier. In the 1817 Constitution, there was a provision that if a member of the militia drew for that service an "annual salary," that person could not also serve in the general assembly.[286] Other than that clear, and no longer operative section, there might be other reasons that someone who rises far enough into the stratosphere of military rank would be treated differently under separation of powers principles. That is the next issue for discussion regarding state separation of powers.

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[278] RICHARD LAWRENCE MILLER, TRUMAN: THE RISE TO POWER 56-59 (1986).

[279] *Id.* at 103-48.

[280] *Id.* at 164-204.

[281] HENRY CABOT LODGE, THE STORM HAS MANY EYES 57-61 (1973).

[282] *Id.* at 57-61.

[283] *Id.* at 57-61.

[284] ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE UNITED STATES SUPREME COURT 863-64 (2d. ed. 1990).

[285] *Id.* at 863-64.

[286] MISS. CONST. of 1817, art. III, § 27.

3. Is a General Just Another Soldier?

The Mississippi Constitution prohibits the powers of one department from being exercised by one of the other departments.[287] Added in 1890 was this sentence: "[t]he acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments."[288] This phrase makes explicit that an existing office is forfeited by acceptance of a new office in another branch. The focus is not on exercise of powers but on positions held. Might a general be holding an "office" even if lower ranking soldiers are not?

Preliminarily, it should be reiterated that this issue arises only if members of the militia are in the executive branch and if the constitution is not found implicitly to permit service in the militia by someone holding office in one of the other branches.

a. 1890 forfeiture of office provision

A lengthy, perhaps exhaustive, but more surely exhausting examination of the background for the 1890 amendments to the state constitution appeared in the first and earlier published part of this Article.[289] That review will be summarized. The goal here is to seek the meaning of that constitution's language that made one form of dual office-holding explicitly unconstitutional for the first time. All dual office-holding was not barred. Some public offices clearly may be held by the same person.[290] It appears that this 1890 amendment was a reaction to perceived "abuse of political authority at all levels of government" during Reconstruction from 1865-1875.[291]

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[287] MISS. CONST. art. 1, § 2.

[288] *Id.*

[289] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 958-71.

[290] *In re* Grant, 631 So. 2d 758, 761-64 (Miss. 1994).

During Reconstruction, for example, many federal-officeholders also served in state or local offices. The frequency and wide-spread nature of the practice is suggested by the fact that in 1873, President Ulysses Grant issued an executive order that a federal official who accepted a state or local office would automatically forfeit the federal office.[292] A few days later a clarifying order was issued that this forfeiture did not apply to service in the militia.[293] Two weeks after Grant's order, a bill was introduced in the Mississippi senate "to prohibit persons from holding and exercising the functions of more than one public office in this State."[294] Language was added to the bill that it "shall not be so construed as to apply to . . . officers of the militia, or to cases where the same is expressly provided for by law."[295] The bill died in committee.[296]

Many Mississippi officials held concurrent state offices. A review of some of those officials and the controversies that the dual service generated was made in the earlier published part of this Article.[297] The 1869 constitution had given the governor authority to appoint all judges and such other officials as the legislature determined.[298] A Republican governor's difficulty in finding sufficient acceptable choices in just-conquered Democratic Mississippi was one of the reasons for selecting Republican legislators or other officials without the appointees resigning their initial positions.[299] "In communities where there were not enough competent Republicans to go around, one man sometimes held several offices, or the offices were distributed among the members of a family."[300]

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[291] William F. Winter, *The Legislature*, *in* YESTERDAY'S CONSTITUTION *TODAY* 25 (Edward H. Hobbs ed., 1960); Eric Charles Clark, The Mississippi Constitutional Convention of 1890: A Political Analysis 135 (1975) (unpublished M.A. thesis, University of Mississippi) (copy on file with author).

[292] VI A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4172-73 (James D. Richardson ed., 1897) (order of Jan. 17, 1873).

[293] *Id.* at 4173-74 (order of Jan. 28, 1873).

[294] 1873 MISS. SEN. J. 1198 (citing Senate Bill 65, introduced Feb. 4, 1873).

[295] *Id.* at 1292.

[296] *Id.* at 1498-99 (recommitted to committee, from which it did not emerge).

[297] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 963-78.

[298] MISS. CONST. of 1869, art. V, §13; art. VI., § 2.

[299] JAMES W. GARNER, RECONSTRUCTION IN MISSISSIPPI 305-15 (Louisiana State Univ. Press 1968) (1901).

In October 1873, which was near the end of Republican rule, a formal Democratic challenge to multiple office-holding occurred in the Mississippi Senate. Some senators sought the expulsion ultimately of five of their Republican colleagues for holding multiple offices in alleged defiance of the state constitution.[301] The Republican Lieutenant Governor Ridgeley Powers, concluded, "after examining with more than ordinary care the judicial opinions bearing directly on the main question now before the Senate," that the challenged GOP senators were illegally serving."[302] I apprehend that the question of one person holding two offices at the same time in Mississippi, divested of all political complications and individual interests, would be considered by all well-informed men as simply *monstrous*.[303]

Only one senator was expelled, but the skirmish may have signified that multiple office-holding was seen as one of the more irritating aspects of carpetbagger and Scalawag rule during Reconstruction.[304] The recurrence of these irritants seemed within the realm of possibility in 1889, which was the year before the new Mississippi Constitution would be written. In 1889, the Republican Party controlled the Presidency and both houses of Congress for the first time since January 1875.[305] It was in 1875 that the Republican government in Mississippi had been overthrown, with a large assist from the intimidation of black voters.[306] In 1889, a Republican national government might for the first time be able to restore its control in Mississippi by restoring black voting power. Massachusetts Republican Representative, Henry Cabot Lodge, Sr. introduced a bill in the 1889 Congress to mandate federal oversight of Southern election practices.[307] Federal election officials would have authority to decide the qualifications of voters and verify returns.[308] This became known as the "Force Bill," which passed the House but died due to a Democratic filibuster in the United States Senate in 1890.[309] While the bill was pending, Mississippi Democrats decided to call for a state constitutional convention.[310] Convention sponsors "argued the necessity of substituting legal for illegal tactics in disfranchising the Negro . . . before a federal 'Force Bill's should pass."[311]

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[300] *Id.* at 314.

[301] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 964-68.

[302] 1873 MISS. SEN. J. 39 (Spec. Sess.).

[303] *Id.*

[304] Southwick, *Separation of Powers [Part I]*, *supra* note 1, at 968; SEN. J. MISS. 42 (Spec. Sess. 1873).

[305] CONGRESSIONAL QUARTERLY, AMERICAN LEADERS 1789-1987: A BIOGRAPHICAL SUMMARY 432-35 (1987) (indicating party divisions for each Congress and the Presidency). For all but two years of this 1875-1889 period, Democrats controlled the House. *Id.* When the GOP gained the House in 1881-1883, the Senate was tied. *Id.*

[306] ALBERT D. KIRWAN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS, 1876-

The convention derived restrictive electoral practices that would disqualify many citizens. A voter would have to "be able to read any section of the constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof."[312] Other issues also received attention at the convention. It is not overly conjectural to assume that the amendment to the separation of powers provisions was intended to establish a constitutional barrier to a repeat of the dual office-holding that occurred during Reconstruction.

For purposes of the *Waller* suit, it is important that the 1890 constitution only barred certain categories of dual service—if the offices were in different departments, or if there were both a federal and a state office of honor and profit—and did not articulate a blanket rejection of serving in two state or local offices. Moreover, often when dual service was prohibited, militia service was expressly excepted from the prohibition.

1925, at 59 (1951).

[307] KARL SCHRIFTGIESSER, THE GENTLEMAN FROM MASSACHUSETTS: HENRY CABOT LODGE 105-07 (1944).

[308] *Id.*

[309] *Id.*

[310] KIRWAN, *supra* note 306, at 59.

[311] *Id.* at 59.

[312] MISS. CONST. art. XII, §§ 243, 244 (repealed 1975).

Examples include President Grant's order and the rejected 1873 senate bill. Indeed, none of the discovered controversies on dual service combined a military and a civilian office. This record makes clear that disputes over office were frequent, bitter, and varied. Raw politics was at least as important as constitutional principle in the battles. Using the constitution to seek removal of inconvenient officeholders is a temptation in every era. The constitutional provision that was adopted required the forfeiture of all offices held in one branch of government by a person who accepted an office in another.[313] Thus, the question is whether rising to the level of general in the Mississippi National Guard might be the acceptance of office in a branch of government. If so, then perhaps becoming a general would cause the forfeiture of an office in another branch. One appellate opinion got within view of deciding this issue, but then declined to do so.[314] When new Mississippi Adjutant General Nat Troutt took office in 1984, he offered to state senator Wayne Burkes the position of Chief of Staff of the Mississippi Air National Guard.[315] The existing chief of staff, Major General Curtis Roberts, brought suit in lieu of resigning.[316] He alleged that Burkes could not be a senator and hold a "position in the executive department."[317] The court determined that the issue was not properly presented:

> It is noted that this section [Article I, § 2] does not concern itself with the person doing the appointing, but seeks to prohibit one from accepting a position in another department of government. Furthermore, its sole remedy is that, if the appointee accepts such appointment, then he will be deemed to have vacated his office in the other department of government. Therefore, no injunction could be granted against Troutt, the appointing Adjutant General, from carrying out his prerogative to appoint Burkes. In this case the relief sought was against the wrong person. In short, the remedy

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[313] MISS. CONST. art. I, § 2.

[314] Roberts v. Troutt, 475 So. 2d 421 (Miss. 1985).

[315] *Roberts*, 475 So. 2d at 422.

[316] *Id.*

[317] *Id.* at 424.

> sought by General Roberts would, of necessity, have to be to enjoin Col. Burkes from accepting the appointment, and not to prohibit General Troutt from making it. Such was not the relief sought by General Roberts in this case.[318]

Whether militia service by judges or by legislators was consistent with separation of powers was therefore not reached by the court.

With this understanding of the origins of the forfeiture position, what is next in importance is the proper interpretation of the constitutional term of "office."

b. *Definition of "Office"*

The Mississippi Constitution creates prerequisites for forfeiture of office under the provisions that we are reviewing. There must be an "acceptance of an office in either of said departments," and the person accepting must then be holding one or more offices "in either of the other departments."[319] That means that there must an "office" in two different branches being held by the same person.

To determine whether someone is an officer of a department of government, the Mississippi Supreme Court traditionally examined whether a person is performing a function "at the core" of the power of that branch.[320] However, in a quite broad statement in the 1994 decision of *In Interest of R.G.*, the court found that Article I, Section 2 of the constitution "makes no distinction between ministerial and discretionary or any other type of duties."[321] The Court then quoted a 1992 dissent:

> [Article I, section 2] refers to "any and all offices." Thus the plain wording of § 2 clearly applies to persons exercising any power in any office belonging to one of the three branches of

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[318] *Id.*

[319] MISS. CONST. art. I, § 2.

[320] *In re* R.G., 632 So. 2d 953, 958 (Miss. 1994) (quoting Alexander v. State *ex rel.* Allain, 441 So. 2d 1329 (Miss. 1983)).

[321] *In re R.G.*, 632 So. 2d at 957.

> government. According to Webster's Third New International Dictionary (1971), the term "office" refers not only to positions of governmental authority but also to any "assigned or assumed duty, task or role" including "consulting, *record keeping*, [and] *clerical work*." (Emphasis added); see also Webster's New Dictionary of Synonyms (1973) (describing the term "office" as analogous to "task, job, chore, stint").
>
> . . . [I]t is clear that § 2 draws no distinction between ministerial offices and offices that have the power to effect policy. Section 2 expressly applies to "any" office. The word "any" is self-explanatory.[322]

This is a confusing decision. The authority cited, a dissent from the two-year old *Ball v. Fitzpatrick* case, had argued unsuccessfully that a separation of powers violation had occurred because the significance of the powers was unimportant — any "chore" would do.[323] The majority in *Ball* held that the person's positions with a county and with a city did not violate separation of powers because "his positions with the Board are ministerial and do not require that he exercise executive or judicial powers."[324] Then, two years later, the court did not overrule *Ball* but seemingly adopts the dissent's formulation of a test. The writer of the unanimous opinion of *In Interest of R.G.*, had joined the dissent in *Ball*.[325] In such ways does the law take new, sometimes unannounced, directions.

To use a thesaurus as the court did, which obviously includes a wide range of words far beyond the primary definition, is unfortunate. The constitutional phrase "acceptance of an office in either of said departments shall . . . vacate any and all offices held" in other departments might more logically have used a word such as "employment" if the court's explanation is to be accepted of anyone performing a task is holding office. It is hard to accept that the word "office" in this phrase meant nothing more than working in the mail room. Words used in statutes are to be interpreted "according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning."[326] Reason does not easily sustain that the common and ordinary meaning of "office" is "analogous to 'task, job, chore, stint,'" though certainly a thesaurus trying liberally to provide every available related word would use that terminology. It is rare and perhaps unique for a court to turn to a thesaurus as opposed to a dictionary. That is because drafters of a constitution would likely be contemplating one, not every, definition of a word that is used.

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[322] *Id.* at 957-58 (quoting Ball v. Fitzpatrick, 602 So. 2d 873, 879 (Miss. 1992) (McRae, J., dissenting)) (citations omitted).

[323] Ball v. Fitzpatrick, 602 So. 2d 873, 879 (Miss. 1992).

[324] *Ball*, 602 So. 2d at 877.

[325] *In re R.G.*, 632 So. 2d at 957.

Dissenting United States Supreme Court Justice Antonin Scalia once wrote that his Court's majority had been "faked out" by the title of a statute, which led his colleagues to ignore its substance.[327] Similarly, that *Ball* dissent may have "faked out" the later court by its highlighting of the word "any" that appears in the phrase "any office." As already discussed, the forfeiture of office provision likely was addressing perceived abuse of multiple office-holding from the Reconstruction period. A person might already have two offices in one branch and then accept a third office in another branch. The constitution required forfeiture of "any and all offices" in the initial branch. The dissent in *Ball* seemed to find that "any" was "self-explanatory," but that begs the question of just what is an "office."

What creates doubt about the state of the law is that later caselaw, though citing the *In Interest of R.G.* decision, still finds that the "fundamental question the Court considers when confronted with a separation of powers problem" is whether "the power being exercised by members of one branch [is] *at the core* of the other's power?"[328]

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[326] MISS. CODE ANN. § 1-3-65 (1998) (stating that technical words should be interpreted according to their technical meaning).

[327] Clinton v. City of New York, 524 U.S. 417, 453, 469 (1998) (Scalia, J., dissenting). "The title of the Line Item Veto Act . . . has succeeded in faking out the Supreme Court." *Clinton*, 524 U.S. at 469. In Scalia's view, the "line item veto" statute was better analyzed as granting the President authority to decline to spend, which has been held constitutional; he accused the majority of becoming so fixated on the title that the substance was missed. *Id.*

[328] Moore v. Bd. of Supervisors, 658 So. 2d 883, 887 (Miss. 1995).

The traditional view distinguishes "officer" from "employee." For example, the court held that a city engineer was not an officer because "[t]he term 'office' implies a delegation of a portion of the sovereign power, and the possession of it by the person filling the office; and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office."[329]

Section 20 in the same 1890 constitution provides that "the term of all officers shall be for some specified period."[330] The Mississippi Supreme Court has defined the word narrowly. It requires that the person hold an "office," which is more than just discharging public duties; the person must have continuing duties, defined by law and discharged by that person without being under the control of another.[331] A standard rule of textual construction is that when the same word appears in the same enactment in more than one location, its definition should be considered the same throughout.[332] Moreover, "constitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other."[333] The word "officer" referring to a person and "office" referring to a position properly could receive that common construction. Rules of construction can be overcome, but the rule appears reasonable in the context of the word "officer" in section 20, requiring a limit to the service of all officers, and in section 2, which prohibits holding an office in more than one branch.

Equally telling is that from the earliest litigation under the Federal Constitution, a distinction has been maintained between "officers" of government that had to be appointed consistent with constitutional limits, and employees who were not subject to the constitutional choices. The "appointments clause" of the United States Constitution provides these rules:

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[329] Damon v. Slaughter, 101 So. 2d 342, 344 (Miss. 1958).

[330] MISS. CONST. art. III, § 20.

[331] Glover v. City of Columbus, 19 So. 2d 756, 757 (Miss. 1944).

[332] Whelan v. Johnston, 6 So. 2d 300, 303 (Miss. 1942); Gibson v. State, 12 So. 582, 583 (Miss. 1893).

[333] Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987) (citing St. Louis & San Francisco Ry. Co. v. Benton County, 96 So. 689, 690 (Miss. 1923)).

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[334]

It is not necessary to make a lengthy analysis of the federal appointments clause. What is meaningful for our purposes is that the federal courts recognize a distinction between government employees and government officers.[335] A further distinction then is made between principal officers and inferior ones.[336] To group all governmental workers, from elected officials and department heads down through the lowest ranking employees, under the rubric of "officers" is an approach unknown to federal law.

Returning to the Mississippi Constitution's reference to "office," the fact that the 1890 convention placed this forfeiture rule in the separation of powers provision indicates that it was closely related to that concept. The purpose of separation of powers was discussed earlier in this Article. What is being blocked is the concentration of power in the hands of the few. When all powers are united in one "magistracy, there can be then no liberty."[337] The Mississippi Supreme Court quoted *The Federalist* that "powers properly belonging to one of the departments ought not be directly and completely administered by either of the other departments."[338] Similar to the *Federalist* view, the Anti-Federalist "Federal Farmer" acknowledged "that the legislative, executive, and judicial powers, ought to be kept distinct; but this, like other general rules, has its exceptions . . . ."[339]

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[334] U.S. CONST. art. II, § 2, cl. 2.

[335] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1974) (per curiam).

[336] Morrison v. Olson, 487 U.S. 654, 671 (1988).

[337] MONTESQUIEU, *supra* note 184, at 202.

[338] Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1336 (Miss. 1983) (quoting THE FEDERALIST, No. 48 (James Madison)).

If the *In Interest of R. G.* understanding of "office" is applied, that forfeiture sweeps far more broadly than does the remainder of the separation of powers bar, which is concerned with *power* and not mere employment. Instead the word refers to anyone performing a "task, job, chore, [or] stint" as do normal employees. It is as if the constitutional prohibition on holding a position that is an "office" in two different branches is being read as a prohibition on having access to a physical office in two different branches. The 1992 *Ball* case recognized the logical meaning, while the 1994 *In Interest of R.G. sub silentio* overruled *Ball*. It is likely that the 1994 case was just a momentary lapse.

The most logical view, then, is that only a few of the highest ranking National Guard officers could possibly be deemed to hold constitutional "offices." Even for those few, no forfeiture of office would occur since the most reasonable conclusion is that militia "officers" are not in any branch of government.

4. Federal Preemption

The National Guard in the various states long ago stopped being totally state organizations. The over-two hundred years of modernization that the Guard has undergone was described at some length by Justice John Paul Stevens in the important decision of *Perpich v. Department of Defense*.[340] The Court discussed that a soldier in a state's militia, now known as that state's National Guard, was by that fact also a member of a federal entity called the National Guard of the United States:

> Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they re-

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[339] Letter from Federal Farmer (Jan. 17, 1788), *in* 2 COMPLETE ANTI-FEDERALIST, *supra* note 70, at 308.

[340] Perpich v. Dep't of Def., 496 U.S. 334 (1990).

> tained their status as members of a separate State Guard unit. Under the 1933 Act, they could be ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army. The statute plainly described the effect of such an order:
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> "All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable. Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status."
>
> Thus, under the "dual enlistment" provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.
>
> Until 1952 the statutory authority to order National Guard units to active duty was limited to periods of national emergency. In that year, Congress broadly authorized orders to "active duty or active duty for training" without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent. The National Guard units have under this plan become a sizeable portion of the Nation's military forces; for example, "the Army National Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army."[341]

The National Guard is today an even greater portion of the overall American military than it was at the time of the 1990 *Perpich* opinion. As integral elements of the federal military force structure, soldiers in the Guard receive federal funds as their pay,[342] follow federal guidelines on their training,[343] and are subject to federal review of their promotions.[344] This substantial federal involvement with and dependence on the Guard creates issues of whether application of state separation of powers to disqualify high-ranking National Guard officers would be constitutional.

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[341] *Perpich*, 496 U.S. at 345-46 (citations omitted).

The doctrine of "federal preemption" is a necessary recognition that the United States Constitution and the laws passed pursuant to that charter are supreme. A current explanation of the criteria for the doctrine's application is this: "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law."[345] Even absent explicit preemption, an implied preemption will arise if the structure and purpose of the federal statute reveal that Congress was creating a pervasive scheme for the governance of the area of law.

> [The] federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." . . . [F]ederal law may be in "irreconcilable conflict" with state law. . . . [T]he state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[346]

Preemption could apply to state rules on the militia if those rules were found to undermine federal regulation of the militia. One analyst, though primarily concerned about the Second Amendment, concluded that "[f]ederal regulation, even if deficient or onerous to the states, can preempt state militia regulation."[347] With the United States Constitution's two militia clauses[348] and with the abundance of federal legislation regarding the National Guard, there is certainly an argument that any state constitutional restrictions would fail if they altered the status of federally recognized soldiers.

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[342] National Guard members "are compensated primarily by the federal government, but receive a small portion of their pay from the state." Swanson v. Faulkner, 55 F.3d 956, 962 n.4 (4th Cir. 1995).

[343] U.S. CONST. art. I, § 8, cl. 16 (providing that Congress has the authority to prescribe the discipline for the training for the state militias).

[344] 32 U.S.C. §§ 301, 305 (2004).

[345] Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25, 30 (1996).

[346] *Id.* at 31 (internal citations omitted).

Though there is reason in the conclusion that federal preemption applies, such preemption cannot itself override the Federal Constitution. The question becomes whether a minimum degree of state separation of powers is constitutionally required. The answer is "yes," but calculating that minimum has never been attempted with any degree of rigor. The United States Supreme Court declared that there is no "particular plan" for separation of powers that is imposed on the states.[349] On the other hand, the states must at least provide for a "republican form of government."[350] According to Chief Justice Rehnquist, the republican form of government requirement does create a limit to the discretion that states have in distributing powers.[351]

If state separation of powers has any minima under the Federal Constitution's command for a republican form of government, it would be logical that so fundamental a mixing of offices as a governor's being eligible simultaneously to serve as a justice on a state's supreme court would be unacceptable. Going one step closer to the issues in this case, a supreme court justice or legislator might be barred from serving as the head of an executive branch department at least if that official exercised a significant part of the powers of the executive. Under that view of the essentials of republican form of government, The Adjutant General, as head of the Military Department, might not be eligible to hold an office in another branch of government regardless of whether a federal agency acting under a federal statute gave recognition to the official.

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[347] J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DETROIT MERCY L. REV. 39 (2001).

[348] U.S. CONST. art. I, § 8, cl. 15, 16.

[349] Mayor of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 615 n.13 (1974).

[350] U.S. CONST. art. IV, § 4.

[351] Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

The issue of the federal constitutional mandate for separate powers in state governments has not been explored by the courts with any degree of care, nor is there reason to proceed here much beyond presenting the issue. What can be said is that if a member of the state's National Guard is by that service, violating state separation of power requirements, federal preemption may not remove the defect.

E. Federal Restrictions on a Public Official's Service in the Military

The principal part of this Article concerns the impact of state constitutional separation of powers rules on dual service in the National Guard and in a state civilian office. At least a brief look should also be given to the federal statutes and regulations that address the propriety of federal officials serving in the military.[352]

Congress and the Department of Defense have concluded that "soldier" and "public official" are not mutually exclusive job titles. Section 973 of Title 10 of the United States Code generally prohibits a commissioned officer of the military from holding a "civil office."[353] The Department of Defense used that statute to create a directive to all soldiers, both officers and enlisted, regarding the holding of civil offices.[354] Both sources of authority announce a blanket prohibition, then provide exceptions.

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[352] Not raising questions about the separation of powers within one sovereign is a state public official's serving in a United States Reserves unit, or a federal official's serving in a state's National Guard except when the Guard has been placed in federal service. These permutations may raise other issues such as a specific prohibition under the state constitution that anyone holding a federal office "of honor or profit" may not also hold state office. MISS. CONST. art. XIV, § 266. Such matters are beyond the scope of the already broad scope of this analysis. *See* Sloan v. Sanford, 593 S.E.2d 470, 474 (S.C. 2004) (holding state's governor could serve in United States Air Force reserves).

[353] 10 U.S.C. § 973(b) (2004).

[354] *Political Activities by Members of the Armed Forces on Active Duty*, Department of Defense Directives No. 1344.10 (Aug. 2, 2004) [hereinafter DOD Directive

The purpose of this century-old statute is to prevent officers from accepting certain high-ranking public positions that would interfere with the performance of their military duties.[355] The prohibitions apply to a "regular officer of an armed force on the active-duty list," and to retired regular officers or reserve officers when they have been called to active federal duty for more than 270 days. [356]The terms relevant to the holding of civil office by active duty or reserve officers are set out in section 973(b)(2):

> (2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not *hold, or exercise the functions* of, a civil office in the Government of the United States—
> (i) that is an elective office;
> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.[357]

These provisions prohibit an officer from both holding the designated federal offices and from exercising the functions of the office, with some exceptions that will be explained. Later provisions in the statute also prohibit the holding of state offices but with somewhat broader exceptions:

> (3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) [which refers to a regular officer in the mili-

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1344.10].

[355] 10 U.S.C. § 973(a) (2004). The statute dates to 1870, when Congress concluded that "a concurrent holding [of civil and military office] might serve to supplant civilian control of government." Lt. Colonel J Thomas Parker, *Congress Amends Performance of Civil Functions Restriction*, ARMY LAW., Oct. 2004, at 1, 1 n.4. The Parker article is an excellent explanation of the effect of this statute and of the Defense Department's application of its principles to enlisted soldiers, as will be discussed below.

[356] 10 U.S.C. § 973(b)(1)(A)–(C) (2004) (emphasis added).

[357] 10 U.S.C. § 973(b)(2) (2004) (emphasis added).

> tary, as opposed to a Reservist or retiree] may not hold or exercise, by election or appointment, the *functions* of a civil office in the government of a State (or of any political subdivision of a State).
>
> (4)(A) An officer to whom this subsection applies by reason of subparagraph (B) or (C) of paragraph (1) [which are Reservists or retirees called to active duty for more than 270 days] may not *hold*, by election or appointment, a civil office in the government of a State (or of any political subdivision of a State) if the holding of such office while this subsection so applies to the officer—
>
> (i) is prohibited under the laws of that State; or
> (ii) as determined by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, interferes with the performance of the officer's duties as an officer of the armed forces.
>
> (B) Except as otherwise authorized by law, while an officer referred to in subparagraph (A) is serving on active duty, the officer may not exercise the functions of a civil office held by the officer as described in that subparagraph.[358]

Section 973 includes a list of prohibited federal offices but does not define "civil office" for purpose of the prohibition on the holding of state or local civil office. The DOD Directive, though, does contain a useful attempt at a definition that might be found persuasive in defining the statutory term. A "civil office" is this:

> A non-military office involving the exercise of the powers or authority of a civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as regular or reserve member of a civilian law enforcement, fire or rescue squad.[359]

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[358] 10 U.S.C. § 973 (emphasis added).

[359] DOD Directive 1344.10, *supra* note 354, ¶ E2.1.3.

Both section 973 and the DOD Directive permit service on a nonpartisan board for a military installation school.[360]

In summary, these provisions apply to a regular officer of one of the armed forces or a reserve or retired officer who has been called to active duty for more than 270 days. Such an individual may not hold an elective office, or one that requires appointment by the President and confirmation by the Senate, or a high-ranking position in the "Executive Schedule." Such an officer also may not campaign for these kind of offices. Most importantly for the issues addressed under state separation of powers, no reservist or National Guardsmen may perform the functions of a civil office if he or she has been called to active duty for more than 270 days. Whether the official may even hold the state office is, under Section 973, a function of other law.[361] For state officials, the "other law" will be their state statutes and rules. The negative pregnant is that a state public office-holder called to active duty for no more than 270 days may continue to perform the duties of the office unless the service is deemed by the Secretary of the Army or other relevant Secretary to interfere "with the performance of the officer's duties" in the military.[362]

In Mississippi in the last decade of the twentieth century and first years of the next century, several public officials have been called to active military duty and have sought official state Attorney General opinions that they may continue to hold their offices while on active duty. These opinions have uniformly concluded that service in a public office and in the National Guard even after being mobilized is appropriate.[363] Equally importantly to the office-holders, some of the opinions have addressed that the officer may continue to draw the salary of the elective position while on active duty, as the salary belongs to the position.[364] These opinions permit an elected official whose military orders are for no more than 270 days to continue to function in the public office, to vote and otherwise participate in the responsibilities of the civilian position, and also to draw the salary. If the official's military orders are for more than 270 days, that official may continue to hold the office and to draw the salary, but he or she must not function in that office.[365]

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[360] 10 U.S.C. § 973(c). Enlisted soldiers may hold similar school board offices at a military installation, serve on a local planning commission, and hold other similar positions. DOD Directive 1344.10, *supra* note 354, ¶ E2.1.4.

[361] 10 U.S.C. § 973(b)(4)(A)(i).

[362] 10 U.S.C. § 973(b)(4)(A)(ii).

[363] Marcus Purnell, Miss. Att'y Gen. Op., No. 02-0257 (2002).

Section 973 by its terms only applies to officers. The Department of Defense has provided guidance on this statute that makes its terms equally applicable to enlisted soldiers. The DOD directive provides that the prohibitions on holding a public office

> do not apply to any retired regular member or Reserve member serving on active duty under a call or order to active duty that specifies a period of active duty of 270 days or less, provided there is no interference with the performance of military duties. If the call or order specifies a period of active duty of more than 270 days, the prohibitions of subparagraph 4.3.1., above, apply beginning on the first day of the active duty period.[366]

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[364] Lynda Babin, Miss. Att'y Gen. Op., No. 91-0012 (1991).

[365] There are examples of a variety of such situations in Mississippi during the early twentieth first century mobilizations. Hinds County Supervisor and National Guard Lieutenant Colonel Charles Barbour continued to participate on the Board of Supervisors despite being called to active duty, as his military orders are for exactly 270 days. Interview with National Guard Lieutenant Colonel Charles Barbour (Sept. 1, 2004). On the other hand, Jackson City Councilman Marshand Crisler is in Iraq as a military policeman on orders for more than 270 days. Sharon Gipson, Miss. Att'y Gen. Op., No. 03-0179 (2003). He is not functioning as a city councilman. A third example is a councilman from the city of Summit, Percy Robinson,. Command Sergeant Major Robinson, while on active duty under orders that apparently were for more than 270 days, has participated in votes by telephone while he has been physically located at the mobilization center at Camp Shelby, Mississippi. Katherine E. Hill, *Summit Budget Vote Saved by Cell Phone*, ENTERPRISE-JOURNAL (McComb, Miss.), Sept. 15, 2004, *at* http://www.enterprise-journal.com/NF/omf/ejournal/ssiuname=WebOSTTN/ssipwd=TTN9CADE4A5/news_story.html?rkey=0033358+sid=20040915132427.81258+cat=news (Sept. 15, 2004).

[366] DOD Directive 1344.10, *supra* note 354, ¶ 4.3.2.

In conclusion, the

> prohibitions on holding and exercising the functions of civil office . . . do not apply to any retired regular member or Reserve member serving on active duty under a call or order to active duty that specifies a period of active duty of 270 days or less, provided the civil office is held in a non-military capacity and there is no interference with the performance of military duties.[367]

A different DOD directive even addresses service by federal Article III judges in the military Reserves. Reservists who can be called involuntarily to active duty are assigned to what is known as the Ready Reserve.[368] Other Reservists who for a variety of reasons are not immediately to be mobilized are placed in the Standby Reserve.[369] Members of Congress, Cabinet officials, and even federal judges may be in the Reserves. However, these individuals are considered to occupy "key positions" and must be placed in the Standby Reserves. The Directive states this about federal judges:

> A Federal position that shall not be vacated during a national emergency or mobilization without SERIOUSLY impairing the capability of the parent Federal Agency or office to function effectively. The four categories of Federal key positions are set out below. [1. Vice President, 2. Congress and Department heads, 3. Judges, and 4. other officials]. The first three categories are, by definition, key positions. However, the third category, Article III Judges, provides for exceptions on a case-by-case basis. The fourth category requires a case-by-case determination and designation as described below.[370]

As to federal judges, the Directive permits them to serve even in the Ready Reserves but only if the Chief Judge of the affected Circuit certifies "that mobilization of the Article III Judge concerned will not seriously impair the capability of the Judge's court to function effectively . . . ."[371]

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[367] DOD Directive 1344.10, *supra* note 354, ¶ 4.3.5.3.

[368] *Screening the Ready Reserve*, Department of Defense Directives No. 1200.7, ¶ 4.1, E2.1.8 (Nov. 18, 1999) [hereinafter DOD Directive 1200.7].

[369] "The Standby Reserve consists of personnel who are maintaining their military affiliation without being in the Ready Reserve, but have been designated 'key civilian employees', or have a temporary hardship or disability." *Id.* ¶ E2.1.9.

[370] *Id.* ¶ E2.1.4.

The existence of an executive branch directive or a legislative branch statute would not validate what the Federal Constitution prohibits. One relevant part of the Federal Constitution is called the "Incompatibility Clause." It provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[372] During the Vietnam War, a federal district judge ruled that this clause prevented a Congressman from serving in one of the armed services' reserve units.[373] The district court declared that an officer's commission in the Reserves was an "Office under the United States."[374] The opinion relied on sources both from the time of the framing of the Constitution as well as subsequent caselaw.[375] The Supreme Court reversed simply on the basis of standing, finding that the plaintiff-citizens' group suffered no concrete injury by the service of members of Congress who also were in the military reserves.[376] Justice Douglas and one other dissenter agreed with the district judge that military service was incompatible with service in Congress.[377]

There has been no other discovered occasion in which the country's highest Court has addressed the Incompatibility Clause in the context of military and congressional office. The executive branch, however, during the administration of President Jimmy Carter, argued that the question was non-justiciable. The counsel to the President requested the opinion of the Justice Department on whether members of Congress could properly serve in the military reserves, "receive pay, earn retirement credits, and advance in rank while serving."[378] There were allegedly at the time of the letter twenty five members of Congress serving in the reserves.[379]

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[371] *Id.* ¶ E2.1.3.

[372] U.S. CONST. art. I, § 6, cl. 2.

[373] Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[374] *Laird*, 323 F. Supp. at 835.

[375] *Id.* at 836.

[376] *Schlesinger*, 418 U.S. at 222-23.

[377] *Id.* at 229 (Douglas, J., dissenting).

The Department of Justice's Office of Legal Counsel responded to the White House Counsel by quoting the constitutional provision that each House would be the judge of the qualifications of its members.[380] As a result of that right, the House or Senate alone could determine whether one of its members was disqualified to serve because of incompatibility of that office with another or for any other reason.[381] The effect of this reasoning is that neither the President nor a court could make a meaningful interpretation of the incompatibility provision since only Congress could make a binding decision.

The Justice Department's reasoning appears sound. The unique power of Congress to decide the qualifications of its own members would prevent members of either House from losing their seats due to incompatible military service unless the members' colleagues ordered explusion. Beyond the specific terms in the incompatibility clause, which solely affect Congress, there may be additional arguments arising from the structure and function of the governmental branches created by the Constitution that would form a basis for disqualification of judges who also serve in the military.

The practice of dual service is well-entrenched even if the number of members of Congress who also serve in either the Reserves or the Guard is diminishing.[382] The concern in this Article has primarily been on state constitutions and officials. Only an introduction to the federal side of the issue is offered.

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[378] *Members of Congress Holding Reserve Commissions*, 1 Op. Off. Legal Counsel 242 (1977). The request for an opinion was in response to a letter from a member of Congress who wanted the President to stop the practice. *Id.*

[379] *Id.*

[380] *Id.* (citing U.S. CONST. art. I, § 5, cl. 1).

[381] *Id.*

[382] *Compare* the seven members of Congress who serve in the Guard or Reserves in 2004, *see supra* text accompanying note 7, and the twenty-five who served in 1977, *see supra* text accompanying note 379.

F. Conclusion

There is considerable support for the proposition that the traditional forms of service in the National Guard are not subject to the principles of separation of powers. Other than for the special situation of officers within the Mississippi Military Department, a complete exemption is the most convincing interpretation of the legal materials. That Military Department situation will be reviewed in a moment. If no complete exemption applies, and if we accept that performing any governmental chore constitutes holding a public office, then generals and privates and the civilian in the mail room all hold "offices." Even if the thesaurus-based definition of "office" as found by the Mississippi Supreme Court in *Interest of R.G.* is rejected as being inconsistent with more practical and traditional views, though, we would still have to determine whether being an especially high-ranking military officer is the constitutional equivalent of holding an "office."

It is evident that even if there is some applicability of separation of powers to traditional National Guardsmen, all military officers would not hold an "office." Whether someone's responsibility and discretion are at the core of the powers of the branch of government is very much a function of rank and position of responsibility. The position of The Adjutant General, the highest ranking administrative position in a state's militia,[383] should be considered an office. It might be noted that late nineteenth century Adjutant General William Henry served as secretary of the senate.[384] Even though senate secretary surely was a legislative position, it probably did not have the core authority necessary for an "office." Today there are several assistant adjutants general,[385] and they too might well be holding office. Whether other general officer positions, or that of the Chief of Staff as was involved in *Roberts v.*

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[383] MISS. CONST. art. IX, § 219.

[384] *For Secretary of Senate*, DAILY CLARION-LEDGER (Jackson, Miss.), Aug. 12, 1895, at 4 (campaign ad). The ad states that he had already been chosen as secretary at the recently ended special session.

[385] MISS. CODE ANN. § 33-3-9 (2000).

Troutt, are also "offices" become increasingly unlikely as distance increases from the top of the command pyramid. At some stage, these lower-ranking commissioned officers would no longer be constitutional "officers." Drawing the line would be a matter of considerable judicial discretion.

If the National Guard itself should not be viewed as an executive branch entity, or if service in the reserve military is seen as unaffected by the separation of powers provision due to persuasive tradition and practice, then an officer of even the highest rank would not be subject to forfeiture if he or she also holds an office in another branch of government. However, even if National Guard service is itself not subject to the separation of powers rules, it is an altogether different matter whether holding an office in the Mississippi Military Department is affected by the forfeiture provision. The Department is an executive branch agency. The Adjutant General, the Assistant Adjutants General, and certain other officers are "in" that Department.[386] Therefore for those individuals, the starting point in the analysis is that they are with some certainty serving in an executive branch agency. The highest ranking positions in the Military Department are likely "offices" in the Executive Branch. Only for those few principal decision-makers would the constitutional prohibition on dual service be a relevant one.

The effect of dual service as a principal "officer-holder" in the Military Department and also in either the judicial or legislative branches would depend on the order in which the different offices were obtained. The constitution provides that acquiring an office in one branch causes the forfeiture of any and all offices then held in another branch.[387] Thus, it is the office first-held that is forfeited. If the Military Department office predated the assumption of an office in another branch of government, then the likely extent of the forfeiture would be the loss of assignment to the Military Department office. The rank and service in the National Guard itself would logically continue, since being a commissioned officer does not depend on the departmental office. On the other hand, if a civilian office in another branch of government predates the acquisition of an office as properly defined in the executive branch Military Department, then the forfeiture would be of the judicial or legislative office.

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[386] MISS. CODE ANN. § 33-3-3 (2000).

[387] MISS. CONST. art. I, § 2.

In summary, the decision on whether a Mississippi Supreme Court justice may properly serve at all in the militia, or as a general, remains jurisprudentially open. The question except in quite rare situations should be answered in the affirmative. This result is driven by the unique nature of the militia under the constitution. The military is controlled by the civilian authorities but its members are not reasonably considered part of civilian government. These conclusions are not affected in any significant way by the funding, oversight, and potential mobilization of the state National Guard into federal military status.

Even if in new litigation the separation of powers analysis finds that the dual service is improper, the *Alexander v. State ex. rel. Allain* option might be taken by the Supreme Court. There, the court, after announcing that a long-standing and accepted practice was unconstitutional, gave time to the affected individuals to eliminate the conflicting office-holding.[388] Only if they failed to do so would the court have ordered forfeiture of office. That was not especially rigorous application of constitutional mandates, but it may have been a reaction to the fact that officeholders have had little basis on which to make reliable predictions regarding the reach of the provision in question.

The original constitutional premise was that militia service is a component of adult male citizenship. The service was not separate from but was integral to the lives of all men. Those who were elected to public office often had the same military responsibilities as other citizen soldiers. Exceptions to those responsibilities came from statutory grace and not by constitutional right. The exempted officials joined teachers, ferry operators and other critical members of society as mere observers to militia musters. The doctrine of separation of powers was an irrelevancy. That doctrine remains irrelevant for the successors of the early militiamen except for those few whose specific and high-ranking military positions in the modern National Guard have been placed by statute in a branch of government.

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[388] Alexander v. State *ex rel.* Allain, 441 So. 2d 1329 (Miss. 1983).

LESSER INCLUDED OFFENSES IN MISSISSIPPI

Michael H. Hoffheimer[*]

The doctrine of lesser included offenses authorizes a jury to convict a defendant of any crime "necessarily included" in a crime charged in an indictment.[1] Over the past decade, the Mississippi Supreme Court has provided conflicting messages about the definition of lesser included offenses. In opinions authored by the same justice, the court concluded that aggravated DUI was a lesser included offense of manslaughter[2] even though aggravated DUI[3] requires proof of additional elements of driving and intoxication not required for manslaughter; it found that aggravated assault was not a lesser included offense of murder;[4] and in 2003, in *State v. Shaw*, the court initially ruled against the state on an unopposed appeal and held that manslaughter was not a lesser included offense of murder.[5]

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Parts of this article's discussion of the history of lesser included offenses and the law of lesser included offenses in other jurisdictions will be expanded in Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. (forthcoming 2005).

[1] The doctrine is codified. MISS. CODE ANN. § 99-19-5(1) (2000 & Supp. 2004); *see infra* text accompanying note 135, quoting statute.

[2] Mayfield v. State, 612 So. 2d 1120, 1125 (Miss. 1992) (McRae, J.); *see also* Craig v. State, 520 So. 2d 487, 492 (Miss. 1988) (holding aggravated DUI lesser included offense of culpable negligence manslaughter). In reaching the result he did in *Mayfield*, Justice McRae expressly rejected the elements test and explicitly acknowledged the rule that manslaughter was a lesser included offense of murder: "By way of analogy, we consider heat of passion manslaughter a lesser included offense to the charge of murder, even though that particular form of manslaughter contemplates proof of a fact inconsistent with the principal charge of murder." *Mayfield*, 612 So. 2d at 1126.

[3] MISS. CODE ANN. § 63-11-30(4) (1996). The crime of aggravated DUI probably does not qualify as a lesser included offense today because the

The 2003 *Shaw* decision prevented prosecutors from pursuing manslaughter charges after a trial court found an

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prescribed punishment has been increased (twenty-five years) and now exceeds that of manslaughter (twenty years). MISS. CODE ANN. § 97-3-25 (2000). Although the rule in *Mayfield* is still cited in the annotated code, that decision may no longer be applicable.

Jurisdictions are divided over whether a lesser included offense must prescribe a lesser level of punishment. *Compare* Commonwealth v. Anderson, 610 A.2d 1042, 1053 (Pa. Super. Ct. 1992) (observing that aggravated assault was not lesser included offense of attempted murder because aggravated assault carried longer prison term) *with* United States v. Dixon, 509 U.S. 688, 718 (1993) (Rehnquist, C.J., concurring and dissenting) (observing that crime of possession with intent to distribute cocaine "cannot easily be conceived of as a lesser included offense of criminal contempt"). Some authorities applying the elements test have concluded that crimes punished more seriously can still be lesser included offenses. *See* United States v. Harley, 990 F.2d 1340, 1344 (D.C. Cir. 1993); Lee v. United States, 668 A.2d 822, 826 (D.C. App. 1995) (discussing cases); State v. Young, 289 S.E.2d 374, 376 (N.C. 1982).

Despite finding that aggravated DUI was a lesser included offense of manslaughter, Justice McRae held that the purpose of the offense was to punish drunk driving rather than homicides, and he concluded that multiple convictions of aggravated DUI, where the intoxicated driver caused multiple deaths, was prohibited. *Mayfield*, 612 So. 2d at 1128. He reversed a second conviction as double jeopardy. *Id.*

Justice McRae did not cite any case law for this novel construction of constitutional law. *Id.* Moreover, his assumptions about the purpose of the statute were based on the location of the statute in the Mississippi Code and the statute's heading as provided by the publisher of the code. *Id.* Justice Banks pointed out this error. *Id.* at 1130-31. (Banks, J., dissenting).

[4] Harris v. State, 723 So. 2d 546, 547 (Miss. 1997) (McRae, J.). Justices Smith and Roberts dissented. *Id.* at 549.

[5] State v. Shaw, 2001-KA-01854-SCT (Miss. 2003) (McRae, P.J.) (affirming dismissal of manslaughter charge and applying elements test to conclude manslaughter not lesser included offense of murder), *withdrawn*, 880 So. 2d 296, 304 (Miss. 2004) (en banc) (Easley, J.) (reversing dismissal of manslaughter charge in response to state's unopposed appeal, holding manslaughter is lesser included offense of murder). Justices Waller, Smith and Cobb dissented from the first withdrawn opinion. State v. Shaw, 2001-KA-01854-SCT (Miss. 2003), *withdrawn*, 880 So. 2d 296, 304 (Miss. 2004). Justices Carlson and Cobb dissented from the second substituted opinion. *Shaw*, 880 So. 2d at 305.

absence of malice necessary for murder. Taken at face value, the court's conclusion that manslaughter was not a lesser included offense of murder would permit defendants to be convicted of both murder and manslaughter for the same homicide; would allow killers to be cumulatively punished for both murder and manslaughter arising from a single death; would authorize the state to try killers separately for either murder or manslaughter in any order; and would eliminate the defendant's right to manslaughter instructions in murder cases.

The implications of the 2003 *Shaw* decision prompted the legislature to amend the state murder statutes in 2004 to provide explicitly that manslaughter is a lesser included offense of murder and capital murder.[6] Following the effective date of the amendments, the supreme court withdrew the initial opinion that had necessitated legislative action and held that manslaughter was, after all, a lesser included offense of murder.[7]

Although the amendments and the second *Shaw* decision remove some uncertainties, they have created new ones. First, the amendments provide that capital murder and murder charges are sufficient to charge not only manslaughter but also "other" lesser included offenses.[8] This raises the question of what offenses other than manslaughter may be lesser included offenses of murder.[9] Second, the second *Shaw* opinion, withdrawing the earlier decision, does not discuss the earlier opinion and explain why it was wrong.[10] Third, there may be lingering questions about the constitutionality of the 2004 amendments given that the withdrawn 2003 decision was based on constitutional grounds.[11]

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[6] MISS. CODE ANN. § 97-3-19(3) (Supp. 2004); *id.* § 99-7-37(2); *id.* § 99-19-5(2). *See infra* notes 152-54 and accompanying text, quoting amendments.

[7] *Shaw*, 880 So. 2d at 304. The court's opinion that the trial court erred in refusing to submit lesser included manslaughter instructions, *id.* at 304-05, is purely advisory, given that the statute permitting prosecutorial appeals provides that the appeal "shall not subject the defendant to further prosecution . . . ." MISS. CODE ANN. § 99-35-103(b) (2000). The defendant neither contested the state's appeal nor its motion for rehearing. The case became doubly moot after the legislative amendments, since those amendments expressly restored manslaughter as a lesser included offense after their effective date.

[8] MISS CODE ANN. § 99-19-5(1) (2000 & Supp. 2004).

[9] The confusion is aggravated by the fact that the supreme court's second opinion in *Shaw* forcefully reasserted its commitment to the position that aggravated assault is not a lesser included offense of homicide crimes. *Shaw*, 880 So. 2d at 299. Justice Carlson argued that such authority was incompatible with the court's conclusion that manslaughter was a lesser included offense. *Id.* at 305.

Moreover, the amendments and the 2004 *Shaw* opinion fail to address the treatment of lesser included offenses outside of homicide prosecutions. They do not remove underlying confusion about lesser included offenses that led to the legal crisis requiring legislative action. That crisis resulted from the supreme court's employment of the elements test as its definition of lesser included offenses. Neither the amendments nor the second *Shaw* decision clarify what test should define lesser included offenses.

This Article attempts to explain the current law in Mississippi governing lesser included homicide offenses. It argues that the 2004 amendments restoring manslaughter as a lesser included offense of murder are constitutional and should be given a broad construction. Further, it argues that policy and precedent both favor avoiding the elements test as the exclusive definition of lesser included offenses in Mississippi criminal cases.

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[10] The court's practice in this case suggests its conviction that in withdrawing and substituting opinions, it need not fully explain the reasons that led it to a different result. This contrasts with the norms of *stare decisis* that traditionally require cogent reasons for altering rules of decision.

Confusion is compounded in the *Shaw* case by the fact that the majority opinion, without referring to the withdrawn opinion, actually incorporates part of the original opinion's text, but copies text from the original dissent on the key issue. *See infra* note 169.

Where Justice McRae originally analyzed the different proof required for murder and manslaughter under a long line of cases, the substituting opinion merely asserts that "[t]he fact that manslaughter proof is inconsistent with that of murder is of no consequence." *Shaw*, 880 So. 2d at 304 (quoting language originally from Isom v. State, 481 So. 2d 820, 824-25 (Miss. 1985) (Robertson, J. concurring)). The court's decision contains two different suggestions as to why manslaughter is a lesser included offense of murder but does not elaborate on either one. *Id.* First, it inserts language that "Shaw was indicted for murder the elements of which do include all the requisite elements for manslaughter." *Id.* at 300-01. Second, it offers the historical explanation that "manslaughter has been consistently held by this Court to be a lesser-included offense of murder." *Id.* at 303.

[11] The strongest argument for the constitutionality of the amendments is paradoxically provided by Justice Carlson's dissent. *Id.* at 305 n.3 (Carlson, J., dissenting).

Part I explains how the doctrine of lesser included offenses operates. Part II follows the history of the doctrine of lesser included offenses from its origins at common law to its partial codification in Mississippi. Part III considers competing definitions of lesser included offenses and examines problems with the elements test. Part IV offers concrete proposals for Mississippi.

I. THE DOCTRINE OF LESSER INCLUDED OFFENSES

A. Summary of the Benefits of Lesser Included Offenses

Most criminal conduct violates more than one section of applicable state and federal criminal codes. For example, under Mississippi statutes, armed robbery of more than five hundred dollars would constitute simple assault,[12] robbery,[13] robbery by use of deadly weapon,[14] robbery of notes,[15] grand larceny,[16] petit larceny,[17] receiving stolen property,[18] willful or malicious trespass[19] and disorderly conduct.[20] Under most circumstances, the conduct would also constitute the crimes of disturbance in a public place,[21] disturbance of the public peace,[22] and carrying a concealed deadly weapon.[23] In addition, the robber would probably automatically qualify under the state's (constitutionally problematic[24]) tramp[25] and vagrancy laws.[26]

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[12] MISS. CODE ANN. § 97-3-7(1)(b) (2000 & Supp. 2004) (enumerating punishment for simple assault to be six months in jail).

[13] MISS. CODE ANN. § 97-3-73 (2000). Robbery is punishable by up to fifteen years imprisonment. *Id.* § 97-3-75.

[14] *Id.* § 97-3-79 (stating armed robbery punishable from three years to life in prison).

[15] *Id.* § 97-3-83 (stating robbery of notes punishable as robbery of goods).

[16] *Id.* § 97-17-41 (Supp. 2004) (defining theft of property valued at $500 and more as grand larceny punishable by up to ten years imprisonment).

[17] *Id.* § 97-17-43 (stating theft of property under value of $500 punishable by six months in jail).

[18] *Id.* § 97-17-70 (stating receipt of stolen property punishable by up to ten years imprisonment where property exceeds $500 in value, punishable by up to six months in jail where property less than $500 in value).

[19] *Id.* § 97-17-87 (stating willful or malicious trespass punishable by up to six months in jail).

[20] *Id.* § 97-35-3(1)(b) (2000) (stating disorderly conduct punishable by up to four months in jail). This statute specifically provides that its provisions "are supplementary to the provisions of any other statue of this state." *Id.* § 97-35-3(3).

[21] *Id.* § 97-35-13 (stating disturbance in public place punishable by up to six

The doctrine of lesser included offenses empowers a jury to find a defendant guilty either of the crime charged in an indictment, of an attempt to commit the crime, or of an "inferior offense" or any other crime "the commission of which is necessarily included" in the crime charged in the indictment.[27] This doctrine serves a number of important functions. It permits a jury to consider culpability of less serious crimes than those named in the indictment, provided the crimes are lesser included offenses. Thus, a jury may find a defendant charged with armed robbery guilty of simple robbery;[28] a defendant charged with robbery guilty of larceny[29] or assault;[30] and a defendant charged with aggravated assault guilty of simple assault.[31] The doctrine facilitates joinder of offenses

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months in jail).

[22] *Id.* § 97-35-15 (stating disturbance in public place punishable by up to six months in jail). This statute specifically provides that its provisions "are supplementary to the provisions of any other statue of this state." § 97-35-15(2).

[23] *Id.* § 97-37-1(a) (stating carrying concealed weapon punishable by six months in jail for first offense).

[24] *Cf.* Robinson v. California, 370 U.S. 660 (1962) (holding that conviction of status offense of being drug addict violated Eighth and Fourteenth Amendments). If the vagrancy statue is not unconstitutional, then every peace officer in the state is at risk of violating MISS. CODE ANN. §§ 97-35-43, 99-29-1 (2000) (establishing duty of sheriffs, deputy sheriffs, constables, police officers and other peace officers to identify and apprehend vagrants and making it a misdemeanor to fail to perform such duties).

[25] MISS. CODE ANN. §§ 97-35-29 to -35 (2000) (defining tramp and authorizing punishment up to one month in jail for first offense).

[26] *Id.* §§ 97-35-37 to -41 (defining vagrant and authorizing punishment up to thirty days in jail for first offense).

[27] *Id.* § 99-19-5(1) (2000 & Supp. 2004); *see infra* text accompanying note 135, quoting text of statute.

[28] *E.g.*, Auman v. State, 271 So. 2d 427 (Miss. 1973); Bogan v. State, 170 So. 282 (Miss. 1936).

[29] *See* Holmes v. State, 660 So. 2d 1225, 1227 (Miss. 1995).

[30] Presley v. State, 321 So. 2d 309, 310 (Miss. 1975) (holding assault to be a lesser included offense of robbery).

[31] Callahan v. State, 419 So. 2d 165 (Miss. 1982); Odom v. State, 767 So. 2d 242 (Miss. Ct. App. 2000).

without the need for a separate indictment, and it provides notice to defendants that they may be tried for lesser included offenses not expressly named in an indictment for a more serious crime.[32]

The doctrine of lesser included offenses prevents multiple prosecutions for some closely related crimes. The Double Jeopardy Clause prevents a defendant from being tried twice for the same offense.[33] The United States Supreme Court held in *Blockburger v. United States*[34] that greater and lesser included offenses are part of the "same offense" under the clause.[35] Accordingly, a defendant could not be first tried for armed robbery and later tried for larceny, or vice versa.

The doctrine also prevents the cumulative punishment of greater and lesser included offenses in the absence of clear legislative intent to impose cumulative punishment.[36] A defendant who commits armed robbery of over five hundred dollars cannot be cumulatively sentenced for armed robbery, robbery, grand larceny, petty larceny and assault—a total of life plus twenty-six years—in the absence of legislative intent to impose cumulative punishment.

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[32] *Cf.* Hailey v. State, 537 So. 2d 411 (Miss. 1988) (holding that because unlawful touching (fondling) charge was not lesser included offense of forcible rape, indictment for rape did not provide defendant sufficient notice he could be tried for offense of unlawful touching).

[33] U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . ."). The Mississippi constitution contains a similar rule limiting multiple prosecutions and convictions: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." MISS. CONST., art. III, § 22. *But see* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4, at 661 n.125 (2d ed. 1999) (discussing authority from fourteen states that adopt the broader "transaction" definition of offenses for purposes of double jeopardy). The language of the Mississippi constitution appears to be more restrictive than the federal provision. For example, a dismissal due to insufficient evidence might not be an "actual acquittal" or "on the merits" for purposes of the state constitution, but such a dismissal bars subsequent prosecution under the Federal Constitution. Fong Foo v. United States, 369 U.S. 141, 143 (1962).

[34] 284 U.S. 299 (1932). *See infra* Part III.C (discussing origin of elements test in constitutional cases).

[35] *Blockburger*, 284 U.S. at 304. The Court held that, for purposes of the Constitution, crimes are part of the same offense unless "each provision requires proof of a fact which the other does not." *Id.* The *Blockburger* test was announced as a method of determining congressional intent with respect to cumulative punishment.

[36] The *Blockburger* test was promulgated as a limit on cumulative punishments for the same offense. But the Court subsequently indicated that *Blockburger* analysis is only a guide to presumptive intent and should be displaced by evidence of actual legislative intent to impose multiple punishment.

The doctrine permits an appellate or trial court to enter judgment on a lesser included offense when the evidence is insufficient to support the verdict on the more serious offense but sufficient to support the verdict on the lesser included offense.[37] Mississippi has long held that "when the jury convicts of a greater offense, which is invalidated on appeal for want of sufficiency of the evidence, no new trial is required and the defendant may be remanded for sentencing upon the lesser included offense where the proof establishes proof of the lesser offense."[38] For example, in *Alford v. State*,[39] the Mississippi Supreme Court found that the evidence failed to prove an essential element of burglary, but it found that the evidence was sufficient to support the factfinding of other elements that comprised the crime of criminal trespass; consequently, the court directed entry of judgment of the lesser included offense of trespass.[40]

For some time, it was uncertain whether Mississippi law authorized trial courts to enter partial verdicts on greater

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Missouri v. Hunter, 459 U.S. 359 (1983) (holding clearly expressed legislative intent controls whether cumulative punishments should be imposed); Albernaz v. United States, 450 U.S. 333, 340 (1981) (stating that *Blockburger* rule "serves as a means of discerning congressional purpose . . . [and] should not be controlling where, for example, there is a clear indication of contrary legislative intent.").

[37] *E.g.*, People v. Dlugash, 363 N.E.2d 1155, 1163 (N.Y. 1977) (holding that where jury's verdict was supported on elements of intentional murder except for causing death that appellate court should direct entry of judgment of attempted murder, observing "the [appellate court] has the authority, where the trial evidence is not legally sufficient to establish the offense of which the defendant was convicted, to modify the judgment to one of conviction for a lesser included offense which is legally established by the evidence.").

[38] Shields v. State, 722 So. 2d 584, 585 (Miss. 1998) (reversing conviction of aggravated assault but remanding for resentencing on simple assault) (citing cases and discussing benefits and constitutional adequacy of rule); *see also* Wells v. State, 305 So. 2d 333 (Miss. 1974) (reversing murder and remanding for resentencing on manslaughter).

[39] 656 So. 2d 1186 (Miss. 1995).

[40] *Alford*, 656 So. 2d at 1187, 1192.

offenses and to proceed with the trial of lesser included offenses.[41] Some dicta suggested that dismissal of an indictment of the more serious charge operated as a dismissal of all lesser offenses.[42] Other holdings were in conflict.[43] The supreme court has removed this uncertainty by explaining that such holdings apply only to dismissal of uncharged lesser offenses, not to lesser included offenses.[44]

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[41] The Mississippi Court of Appeals, in the face of confusing messages from the supreme court, has held that dismissal of the charge in the indictment comprises dismissal of lesser included offenses. Fulcher v. State, 805 So. 2d 556, 571 (Miss. Ct . App. 2001) ("[T]he question is what happens if there is a court-directed verdict as to the principle [sic] offense, can the court thereafter instruct the jury on the lesser-included-offense which was not alleged in the indictment? The answer to that question is no.").

[42] This influenced Justice McRae's opinion in *State v. Shaw*, 2001-KA-01854-SCT (Miss. 2003) (affirming trial court's refusal to proceed with manslaughter charge after dismissal of murder charge), *withdrawn*, 880 So. 2d 296, 304 (Miss. 2004) (en banc) (Easley, J.) (holding that trial court should have submitted manslaughter charge after dismissal of murder charge); *see also* Harris v. State, 723 So. 2d 546 (Miss. 1997); Fulcher v. State, 805 So. 2d 556 (Miss. Ct. App. 2001). In rejecting the practice of limited directed verdicts, the supreme court was motivated by two concerns. First, it feared that defendants were not adequately notified of the risk of trial on lesser offenses, *Harris*, 723 So. 2d at 549. The short response to this concern is that the doctrine of lesser included offenses provides such notice. Second, the court feared that partial verdicts might encourage the state to charge more serious offenses than the evidence supports. *Id.* at 549 ("The State cannot be allowed to charge only the highest offense and then test the evidence as it goes along until the burden for some lesser offense is met.").

The source of the second fear was Justice McRae's personal belief that when the state charges a serious crime, it should not be able to win a conviction of a less serious one. The clearest statement of this principal is in his dissent in *Shields v. State*, 722 So. 2d 584, 589-90 (Miss. 1998). According to Justice McRae, the failure of the state to prevail on its original charge should lead to outright acquittal. *Id.* at 589 ("The State failed to meet its burden of proof for the aggravated assault charge . . . . The case should be dismissed on the merits."); *see also* Wolfe v. State, 743 So. 2d 380 (Miss. 1999) (McRae, J., dissenting) (reversing felony child abuse conviction where trial court had permitted state to proceed on alternative theory of torture without amending complaint but remanding because trial court erred in finding insufficient evidence to support original theory of serious bodily injury). Justice McRae insisted that the state must be limited to its original charge: "The state was given its opportunity to prove its case against the defendant, and it failed." *Wolfe* , 743 So. 2d at 388 (McRae, J., dissenting).

The McRae rule had paradoxical consequences. It required a prosecutor to proceed with a weak case on a serious crime (which he or she may personally believe is not meritorious) in order to obtain instruction on appropriate lesser included offense instructions. And it encouraged trial courts to deny meritorious motions for acquittal of serious charges in order to preserve the case on more meritorious lesser included offenses.

[43] In *Ostrander v. State*, 803 So. 2d 1172 (Miss. 2002), the court affirmed a conviction of first-time DUI where defendant had been charged with second DUI. The court emphasized that the decision in *Harris* was limited to a case where the

Accordingly, it is proper for a trial court to submit lesser included offense charges when supported by evidence, even after dismissing the principal offense charged in an indictment.[45] This rule makes sense because there are other rules that serve to discourage prosecutors from overcharging defendants.[46] Punishing prosecutors who fail to prove their case by acquitting defendants of uncharged offenses is exactly the result that the doctrine of lesser included offenses is designed to prevent. Nor, ultimately, does such dismissal help defendants. Dismissing lesser included offenses might appear to be a windfall that defendants would welcome. But a policy requiring dismissal would disadvantage defendants by providing a powerful disincentive against dismissing charges that prosecutors or trial courts discover are weak or unsupported.[47]

All in all, the doctrine of lesser included offenses benefits prosecutors by allowing them to proceed to trial without reindicting or amending indictments. This is especially helpful

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trial court entered "an unqualified acquittal" on the charge, which may mean a decision on the merits acquitting the defendant of all lesser included offenses. *Ostrander*, 803 So. 2d at 1176.

[44] State v. Shaw, 880 So. 2d 296, 303-04 (Miss. 2004) (distinguishing caselaw holding that dismissal of charged offense prevents submission of lesser related offense from case where court was authorized to submit lesser included offense after dismissal of charged offense).

[45] *Shaw*, 880 So. 2d at 303-04.

[46] *See* MISS. RULES OF PROF'L CONDUCT R. 3.8(a) (1987) (stating prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); *see also id.*, R. 3.3 (prohibiting false statements and introduction of evidence known to be false). There is no reason to think that nonmeritorious prosecutions are so widespread that they require a judicially imposed rule of acquittal where evidence is found to be insufficient at trial. Such a policy would be especially inappropriate because failure of proof is often beyond the control of the prosecutor—as, for example, where witnesses do not appear or do not testify as anticipated.

[47] It is not reversible error for the trial court to give lesser included offense instructions together with instructions on the greater charge when the greater charge is not supported by the evidence, although Justice McRae wanted the court to so hold in another case. Arthur v. State, 735 So. 2d 213, 221 (Miss. 1999) (McRae, J., dissenting).

in Mississippi where the state constitution prevents substantive amendments of indictments without the agreement of the grand jury that returned the indictment.[48]

The doctrine benefits defendants by allowing them to request instruction on less serious crimes that may be more appropriate. This can reduce the pressure on juries to convict of a more serious crime crime when presented with evidence of severe misconduct.[49] To promote accurate factfinding, Mississippi law also accords defendants the right to a jury instruction on certain related lesser offenses that do not qualify as lesser included offenses when such instruction is necessary to present the defendant's theory of the case.[50]

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[48] MISS. CONST. art. III, § 27 (requiring indictment); Wolfe v. State, 743 So. 2d 380, 384 (Miss. 1999) ("It has long since been the law of this State that courts may not amend an indictment as to a substantive matter, without the agreement of the grand jury which issued the indictment, unless the amendment only regards mere formalities.").

[49] The supreme court discussed the danger of wrongful convictions in *Boyd v. State*, 557 So. 2d 1178, 1181 (Miss. 1989) (observing that the failure to charge on appropriate lesser included offenses "forces the jury, when it has the choice between finding the defendant guilty of something or allowing him to go free, to convict a defendant of a greater offense when he could possibly only be guilty of a lesser crime.").

[50] *E.g.*, Green v. State, 2001-CT-00870-SCT, ¶ 7 (Miss. 2004), 884 So. 2d 733 (reversing conviction of sale of cocaine and holding defendant entitled to requested jury instruction on lesser related, non-included crime of selling fake cocaine); Moore v. State, 799 So. 2d 89, 91 (Miss. 2001) (holding instruction on lesser offense of contributing to neglect of child was proper in trial for felony child abuse in order to present defense theory, even though it was not lesser included offense); Gangl v. State, 539 So. 2d 132, 135-37 (Miss. 1989) (holding defendant entitled to instruction on crime of accessory after fact, though not a lesser included offense of robbery, where defendant was not present at robbery and claimed he learned of crime after it occurred); Dupuis v. State, 872 So. 2d 724, 729 (Miss. Ct. App. 2004) (holding defendant properly convicted of lesser non-included offense of unlawful touching when defendant requested instruction on offense); Williams v. State, 799 So. 2d 372, 377-78 (Miss. Ct. App. 2001) (holding instruction on disorderly conduct was proper, as necessary to present defense theory, even though disorderly conduct was not lesser included offense of assault).

In *McDonald v. State*, 784 So. 2d 261, 264 (Miss. Ct. App. 2001), the court of appeals held that a defendant charged with simple assault was entitled to a lesser included offense instruction on the crime of resisting arrest. Although the court joined counsel in characterizing resisting arrest as a lesser included offense of assault, that crime might better be classified as a lesser related offense; *see* Barber v. State, 743 So. 2d 1054, 1057 (Miss. Ct. App. 1999) (Southwick, P.J., dissenting) (questioning characterization of resisting arrest as lesser included

The doctrine of lesser included offenses has never been a perfect solution to the problem of multiple charges, but its chief weakness is that it underprotects. The doctrine of lesser included offenses provides a necessary but insufficient protection against multiple prosecutions for closely related crimes. This is due to the fact that many crimes that should not be separately prosecuted or punished fail to qualify as lesser included offenses. The reason for this will be explained in Part II, which treats the definition of lesser included offenses. For example, in Mississippi, the crime of unlawful touching of a child is not a lesser included offense of forcible rape;[51] the crime of contributing to the neglect of a child is not a lesser included offense of felony child abuse;[52] and the crime of simple assault is not a lesser included offense of touching child for lustful purpose.[53]

B. Disadvantages of Lesser Included Offenses and the Evidentiary Requirement

If lesser included offense instructions presented no disadvantages, parties would always want them, and courts would always give them. But the doctrine of lesser included offenses also entails disadvantages, though these are less immediately obvious than the advantages and have received less thorough discussion by courts and scholars.

Most of the problems posed by lesser included offenses stem from the risk that a jury, given the option of convicting of both greater and lesser included offenses, may evade its responsibility to conduct rigorous factfinding on all elements of the charged offense and, instead, compromise the verdict by convicting of the lesser offense.[54] In cases where inculpatory

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offense and arguing that it was rather lesser related offense).

The dividing line between lesser included and lesser related but non-included offenses has moved over time. Justice Carlson has discussed the inconsistent judicial characterizations of manslaughter. State v. Shaw, 880 So. 2d 296, 305-10 (Miss. 2004) (Carlson, J., dissenting).

[51] Hailey v. State, 537 So. 2d 411, 415 (Miss. 1988).

[52] Moore v. State, 799 So. 2d 89, 90-91 (Miss. 2001).

[53] Goodnite v. State, 799 So. 2d 64, 69 (Miss. 2001) (holding pinching victim between legs did not warrant finding of attempt to cause bodily harm).

[54] Mississippi cases grappled with whether the giving of manslaughter instruc-

evidence is strong, prosecutors will want to avoid lesser included offense charges in order to reduce this danger. For example, in a case where a self-defense claim is raised, a prosecutor may not want to allow uncertainty created by the defense to result in a compromise verdict of manslaughter rather than murder. Conversely, in cases where strong exculpating or mitigating evidence is present, a defendant may seek to avoid lesser included offense charges, hoping the jury, faced with the all-or-nothing choice of convicting of the serious crime, will acquit.[55]

In the 1800s, the United States Supreme Court decided that the jury's constitutional power to convict of lesser included offenses does not require juries to be instructed on all possible lesser included offenses in all cases. In *Sparf v. United States*,[56] the Supreme Court affirmed a murder conviction where the jury was not only not instructed on manslaughter but was, in response to a query from the jury about convicting of manslaughter, directed either to convict of murder or acquit.[57] The Court explained that the trial court properly omit-

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tions in a case where there was sufficient evidence of murder, but not of manslaughter, would be prejudicial error, reasoning on the one hand that such instructions might encourage improper compromise, Rester v. State, 70 So. 881, 883 (Miss. 1916), but reasoning on the other hand that the error would be harmless since the defendant could have been convicted of murder, Calicoat v. State, 95 So. 318, 322 (Miss. 1922) (discussing cases). *See infra* Part IV.B.4 discussing the contemporary judicial treatment of this issue.

[55] For example, a sympathetic mother who kills the man who raped her child may opt not to request manslaughter instructions, gambling that the jury will find her not guilty of murder. For some time, cases appeared to leave the ultimate decision of whether to instruct up to the defendant. *See* State v. Shaw, 880 So. 2d 296, 305-10 (Miss. 2004) (Carlson, J., dissenting):

> I was the trial judge in *Hailey v. State*, 537 So. 2d 411 (Miss. 1988)], and quite frankly, after this Court's pronouncement in *Hailey*, notwithstanding the fact that *Hailey* was not a murder case, I was of the opinion that in a murder case, a manslaughter instruction could be given only if (1) supported by the evidence, *and* (2) if requested or agreed to by the defendant.

Shaw, 880 So. 2d at 306 (Carlson, J., dissenting). The 2004 amendments permit instruction "upon the court's own motion" when supported by evidence. MISS. CODE ANN. § 99-19-5(2) (Supp. 2004).

[56] 156 U.S. 51, 63-64 (1895).

[57] *Sparf*, 156 U.S. at 63-64. The two defendants actively participated in the deliberate killing "under the most revolting circumstances" in a vessel, bringing

ted instructions not warranted by the evidence: "The court below assumed, and correctly, that [federal law permitting conviction of lesser included offenses] did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing."[58]

Like other jurisdictions,[59] Mississippi requires an evidentiary basis for lesser included offense instruction.[60] The Mississippi Supreme Court has explained that "if the evidence does not justify submission of a lesser included offense [charge], the court should refuse to do so. Unwarranted submission of a lesser offense is an invitation to the jury to disregard the law."[61] For this reason, a defendant is not entitled to

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the case within federal admiralty jurisdiction. *Id.* at 53. The trial court instructed, "If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder." *Id.* at 61 n.1 (quoting jury instruction).

[58] *Id.* at 63.

[59] In line with decisions going back to *Sparf*, federal courts require that there be some evidentiary basis to support the lesser included offense instruction: "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989) (citing Keeble v. United States, 412 U.S. 205, 208 (1973)). *See* Sansone v. United States, 380 U.S. 343, 349-50 (1965); United States v. Deisch, 20 F.3d 139, 142 (5th Cir. 1995) (holding that defendant requesting lesser included offense instructions must show "(1) the elements of the offense are a subset of the elements of the charged offense and (2) the evidence at trial permits a jury to rationally find the defendant guilty of the lesser offense yet acquit him of the greater."); *see also* United States v. Harrison, 55 F.3d 163, 166 (5th Cir. 1995).

States generally impose a similar evidentiary prerequisite. Shellenberger and Strazzella summarize the rule: "[n]ot only must the evidence support a conviction for the [lesser included offense], it must also support an acquittal of the greater offense. In other words, there must be a rational factual dispute about the element or elements that differentiate the greater and lesser offenses." James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 7 (1995).

[60] *See infra* notes 78-85.

[61] Presley v. State, 321 So. 2d 309, 310-11 (Miss. 1975) (holding that refusal to give assault instruction at robbery trial was not error where court concluded that evidence proved defendant's guilt beyond reasonable doubt). *Presley* was probably wrongly decided, except to the extent it rested its holding on the (now unmeritorious) theory that the requested instruction incorrectly described the law. *Cf.* McKee v. State, 791 So. 2d 804, 810-11 (Miss. 2001); *see* Harper v. State, 478

a manslaughter instruction in a case where the only issue is self-defense[62] or where the prosecutor's theory of the case is malice murder and the defense theory is legal insanity.[63] A defendant charged with capital murder who raises an alibi defense is not entitled to a lesser included offense instructions on manslaughter.[64] Nor is a defendant entitled to a simple assault instruction where the prosecutor's theory is that the defendant intentionally shot the victim and the defense theory was that the victim fired first.[65]

When lesser included instructions are not requested, their omission is not error.[66] Mississippi traditionally respected the power of parties to control litigation in this regard, noting that even when supported by evidence, the instructions may be waived for valid strategic purposes.[67] But, under the 2004 amendments, a trial judge is authorized to give lesser included offense instructions in homicide cases even in the absence of a request by either party.[68] Similarly, where the defendant

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So. 2d 1017, 1018 (Miss. 1985) (observing that trial judge has responsibility to reform and correct deficiency in language in proffered instruction to which party is entitled). In *Presley*, the defendant's testimony clearly created a fact question as to his intent to steal, and a reasonable jury could have concluded either that the defendant was telling the truth or that there was sufficient doubt to prevent a conviction of robbery. *Presley*, 321 So. 2d at 310.

[62] Hannah v. State, 39 So. 855, 856 (Miss. 1905).

[63] Woodham v. State, 800 So. 2d 1148, 1156 (Miss. 2001).

[64] Howell v. State, 860 So. 2d 704, 744 (Miss. 2003), *cert. granted*, 124 S. Ct. 2908 (2004); *see infra* notes 209 and 216.

[65] Reddix v. State, 731 So. 2d 591, 594 (Miss. 1999) ("Here, the evidence could only justify a conviction of aggravated assault or an acquittal based on self defense. Therefore, the trial court properly refused [defendant's] lesser-included-offense instruction.").

[66] *E.g.*, Moody v. State, 841 So. 2d 1067, 1096-97 (Miss. 2003) (holding failure to object to omission of manslaughter instruction constitutes procedural bar); Richmond v. State, 751 So. 2d 1038, 1047 (Miss. 1999) ("Likewise, the lesser-included offense of trespass was properly refused because it was not requested by [defendant] . . . .").

[67] Maxwell v. State, 856 So. 2d 513, 515 (Miss. Ct. App. 2003) ("Counsel's decision to refuse a manslaughter instruction, coupled with his decision to employ a defense based entirely on self-defense, was apparently his chosen strategy of representation. Attorneys are permitted wide latitude in their choice and employment of defense strategy.") (quoting Hiter v. State, 660 So. 2d 961, 965 (Miss. 1995).

[68] MISS. CODE ANN. § 99-7-37(2) (Supp. 2004); *see infra* text accompanying note 153 (citing statute). This change permits but does not require courts to give

fails to object to the submission of lesser included offense instructions, he or she cannot raise the issue on appeal.[69] By requesting instruction on a lesser offense that is not a lesser included offense, a defendant waives any objection based on the theory that the original charge did not include the offense.[70] But, when a party requests a lesser included offense instruction to which it is entitled, the trial judge may not refuse it because it is deficient in form.[71]

When instructions are properly requested, the Mississippi cases have failed to adopt an entirely uniform approach in explaining the circumstances under which the failure of the trial court to give such instructions constitutes reversible error. On the one hand, the Mississippi Supreme Court has observed that "our case law favors lesser-included offense instructions being given to the jury."[72] The court has repeat-

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such instructions. Some scholars argue that courts should give lesser included offense instructions supported by evidence even when they are not requested by parties. *See generally* Catherine L. Carpenter, *The All-Or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 262 (1999) (discussing authority and proposing that lesser included offense instruction should be required even where parties fail to request).

[69] Moore v. State, 799 So. 2d 89, 91 (Miss. 2001) (holding that defendant waived any objection to giving instruction of crime that was not lesser included offense when defendant not only failed to object but requested such instruction). *But see* Friley v. State, 879 So. 2d 1031, 1034 (Miss. 2004) ("We find that the objection made by Friley's trial counsel, although not artfully stated, was sufficient to preserve this issue for appeal.").

[70] Dupuis v. State, 872 So. 2d 724, 729 (Miss. Ct. App. 2004) (affirming conviction of unlawful touching where defendant requested instruction on that offense even though court of appeals had held that the crime was not lesser included offense of sexual battery because "lack of an indictment on offense of unlawful touching was waived"); Gangl v. State, 539 So. 2d 132, 136 (Miss. 1989) (noting that by requesting lesser related offense instruction, defendant waived any argument that indictment did not properly charge the crime).

[71] Harper v. State, 478 So. 2d 1017, 1018 (Miss. 1985) (holding "trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new, corrected instruction.").

[72] Woodham v. State, 800 So. 2d 1148, 1157 (Miss. 2004) (citing Agnew v. State, 783 So. 2d 699, 703 (Miss. 2001). See *Odom v. State*, 767 So. 2d 242, 246 (Miss. Ct. App. 2000), stating:

> It is well settled that a lesser-included-offense instruction *should* be given unless the trial court determines, by looking at the evidence in the light most favorable to the accused, and considering all reasonable favorable

edly stated that doubts should be resolved in favor of giving such instructions.[73] On the other hand, the court has emphasized that "an instruction should not be given automatically,"[74] and it has cautioned that "lesser-included offense instructions should not be indiscriminately granted."[75] While observing that the evidence should be viewed from the defendant's perspective in determining whether an instruction must be given, the court also observes that a jury verdict should not be overturned so long as it is supported by credible evidence (presumably evaluated in the light most favorable to the prosecution).[76]

Lesser included offense instructions are not always required. They are not required just because evidence of the greater crime would be sufficient to support a conviction of the lesser.[77] In general, the instructions are required when, un-

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> inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser-included-offense, and ultimately not guilty of at least one element of the principal charge.

Odom, 767 So. 2d at 246 (citing Hutchinson v. State, 594 So. 2d 17, 18 (Miss. 1992)), Harper v. State, 478 So. 2d 1017, 1021 (Miss. 1985).

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> This Court has repeatedly stated that: "[a] lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant, guilty of a lesser-included offense (conversely, not guilty of at least one essential element of the principal charge."

Woodham, 800 So. 2d at 1156-57 (quoting Greenlee v. State, 725 So. 2d 816, 823 (Miss. 1998) (quoting Harper v. State, 478 So. 2d 1017, 1021 (Miss. 1985)); *see* Taylor v. State, 577 So. 2d 381, 384 (Miss. 1991) (reversing aggravated assault conviction where trial court refused requested instruction on simple assault where record suggested fact question existed as to both motivation and severity of injuries); *see also* Armstead v. State, 503 So. 2d 281, 285 (Miss. 1987) (reversing burglary and attempted rape convictions where trial court applied wrong standard by considering evidence in light most favorable to state in refusing requested lesser included offense instruction on assault).

[74] *Woodham*, 800 So. 2d at 1157 (citing Mease v. State, 539 So. 2d 1324, 1329 (Miss. 1989)).

[75] McKee v. State, 791 So. 2d 804, 810 (Miss. 2001) (citing Lee v. State, 469 So. 2d 1225, 1228 (Miss. 1985)).

[76] *See* Brown v. State, 749 So. 2d 82, 89 (Miss. 1999).

[77] Reynolds v. State, 658 So. 2d 852, 856 (Miss. 1995) (affirming conviction of

der the evidence, it would be reasonable for a jury to convict *only* of the lesser included offense and not also of the greater offense.[78] Instructions are not required when the defense theory is purely speculative.[79] Because the defendant has the burden of showing legally adequate provocation to mitigate murder to manslaughter, the failure to give voluntary manslaughter instructions is proper in a case where the evidence shows the defendant killed the victim intentionally but does not reveal any source of provocation.[80] Likewise, the instructions are properly omitted when they are inconsistent with the defendant's own evidence that he did not cause the victim's death.[81]

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sale of controlled substance and holding that instruction on crime of possession was properly refused, observing "the mere fact that one must possess a controlled substance before they [sic] can sell it is not enough to require a lesser included offense instruction.").

[78] "[A] lesser-included offense instruction should only be refused in cases where the evidence could only justify a conviction of the principal charge." Perkins v. State. 788 So. 2d 826, 828 (Miss. Ct. App. 2001) (citing Ruffin v. State, 444 So. 2d 839, 840 (Miss. 1984)). "A lesser-included offense instruction is appropriate only in those cases where a jury could find the defendant not guilty of the principal charge but guilty of a lesser offense." *Brown*, 749 So. 2d at 89 (citing Evans v. State, 725 So. 2d 613, 664 (Miss. 1997); Davis v. State, 684 So. 2d 643, 656-57 (Miss. 1996)).

For cases applying the requirement, see, for example, Harbin v. State, 478 So. 2d 796 (Miss. 1985) (holding trial court properly refused to give simple assault charge where evidence included defendant's repeated blows to victim, striking her with brick and statements that he wanted to kill her); Comby v. State, 2003-KA-01075-COA, ¶ 16 (Miss. Ct. App. 2004) (holding trial court properly refused to instruct on failure to yield in aggravated DUI case where defendant admitted drinking six beers prior to conduct causing death), *motion for reh'g filed*, No. 2004-4122 (Miss. Dec. 28, 2004); Selders v. State, 794 So. 2d 281, 286 (Miss. Ct. App. 2001) (holding trial court properly refused negligent assault instruction in multiple stabbing assault); Taylor v. State, 763 So. 2d 913, 916 (Miss. Ct. App. 2000) (holding simple assault instruction properly refused in case where defendant was charged with aggravated assault for attacking victim with hatchet where reasonable jury could not have found appellant not guilty of aggravated assault but guilty of simple assault).

[79] Moody v. State, 841 So. 2d at 1096-97 (Miss. 2003) (holding omission of voluntary manslaughter instruction proper in felony murder case lacking evidence in record to support finding of provocation or heat of passion).

[80] Agnew v. State, 783 So. 2d 699, 701 (Miss. 2001) (affirming murder conviction despite failure to give requested manslaughter instruction where evidence showed defendant stabbed his girlfriend but offered no basis for finding provocation or heat of passion).

[81] *See* Hall v. State, 2003-KA-01517-COA, ¶ 23 (Miss. Ct. App. 2004), 2004

In *Harper v. State*, the court leaned over backwards to find possible exculpatory evidence, reversing a burglary conviction where the defendant claimed he broke into a house after midnight to see his daughter rather than to engage in a fight, although witnesses testified that the defendant stated he was going to kill the occupant.[82] In other cases, the court has leaned over backwards to minimize the credibility of defense theories. The court affirmed a robbery conviction where petit larceny instructions were refused even though the element of force was in dispute.[83] It has tended to dismiss improbable exculpatory facts altogether rather than insist that their credibility be assessed in the light most favorable to the defense.[84] For example, the court held that a defendant pros-

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Miss. App. LEXIS 907 (holding trial court properly refused heat-of-passion manslaughter instructions where defense witnesses offered no evidence of mitigation but instead supported defense theory that third person caused death of victim).

[82] Harper v. State, 478 So. 2d 1017, 1023 (Miss. 1985) (reversing and remanding for new trial for burglary and requiring lesser included offense instruction on trespass). In *Robinson v. State*, 589 So. 2d 116 (Miss. 1991) (reversing burglary conviction and remanding for retrial with lesser included offense instructions on criminal trespass), the record presented a stronger case for the instructions because the jury had convicted of burglary but failed to convict of the crime that was the supposed object of the burglary.

See also Lee v. State, 469 So. 2d 1225 (Miss. 1985) (reversing aggravated assault conviction and holding prisoner, who took guard hostage and threatened him with knife, was entitled to simple assault instruction based on defendant's claim that guard had previously conspired to allow prisoner to escape but later changed his mind).

[83] The court explained that the record was devoid of evidence to support a finding as to the value of the stolen property. *McKee*, 791 So. 2d at 810. Justice Banks dissented, observing that this explanation was incompatible with the state's burden of proving the value of property. *Id.* at 812-13 (Banks, J., dissenting); *see also* Arbuckle v. State, 2003-KA-00335-COA, ¶ 11 (Miss. Ct. App. 2004) (affirming burglary conviction despite refusal to instruct on criminal trespass where defendants denied intent to commit felony prior to unlawful entry), *motion for reh'g filed*, No. 2004-4067 (Miss. Dec. 21, 2004).

[84] *E.g.*, *Perkins*, 788 So. 2d at 828-29 (holding that neighbor apprehended soon after burglary with stolen property was not entitled to lesser included offense instructions based on implausible theory that he found the stolen property outside the home). In a similar vein, the court held that simple murder instructions were not required in a capital murder case prosecuted on the theory that the defendant killed the victim during a robbery where the defendant raised an alibi defense. Howell v. State, 860 So. 2d 704 (Miss. 2003), *cert. granted*, 124 S. Ct. 2908 (2004). The result in *Howell* is troubling because the inculpatory evidence of the robbery motive came from accomplices whose testimony might well have been

ecuted for depraved heart murder was not entitled to have the jury instructed on culpable negligence manslaughter.[85] This decision is troubling because, by deciding that the trial record supports only a finding of depraved heart murder and not culpable negligence manslaughter, the appellate court risks substituting its evaluation of the evidence for that of the factfinder.

II. HISTORY OF LESSER INCLUDED OFFENSES

A. *Common Law Roots*

The doctrine of lesser included offenses emerged at common law as a modification of the rules governing indictments during an age when the failure to employ the proper language in an indictment and the failure to prove all facts alleged in an indictment resulted in a dismissal or acquittal.[86] In the

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questioned by jurors who nevertheless accepted the stronger evidence of defendant's liability for intentional shooting. *Id.* at 706; *see infra* notes 209 and 216.

[85] Sanders v. State, 781 So. 2d 114 (Miss. 2001). For a similar decision, see Goff v. State, 778 So. 2d 779 (Miss. Ct. App. 2000). The victim in *Sanders* died after the defendant struck him once in the head with a hammer during an argument. *Sanders*, 781 So. 2d at 116. In Mississippi, the difference between the depraved heart mental state required for murder and the culpable negligence mental state required for manslaughter is disregard of human life as opposed to disregard of the safety of others. *See generally* Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi*, 71 MISS. L.J. 35, 105-40 (2001). Although the defendant's state of mind is a fact question for the jury, the court in *Sanders* reasoned that the lesser included offense instruction on culpable negligence was improper because a reasonable jury could not find the defendant guilty of *only* culpable negligence because the defendant's own case revealed "more than disregard of the victims's safety." *Sanders*, 781 So. 2d at 120-21. In fact the defendant's case established ample facts from which the jury could (and did) infer disregard of human life. *Id.* But such facts *also* showed disregard of safety, and the omission of the manslaughter instruction failed to permit the jury to determine whether the unintentional killing was more appropriately classified as the result of disregard of life or safety.

The defendant's behavior in *Sanders* was especially heinous, as he returned to the crime scene while the victim slowly died. *Id.* at 116. The defendant's failure to summon help under the circumstances, where there was a duty to aid, provided sufficient evidence for deliberate design murder. Therefore, the holding in *Sanders* that culpable negligence manslaughter instructions are not required in depraved heart murder cases should either be overruled or limited to its extreme facts. *Id.*

[86] For examples of pleading requirements, see 2 MATTHEW HALE, HISTORIA

1600s, Matthew Hale already denounced the legal formalism that invalidated many indictments as "a blemish and inconvenience in the law" that resulted in injustice, and he called for legal reform.[87] On the eve of the American Revolution, Blackstone's description of indictments showed that they still retained many of the formal requirements of a century earlier even though they were now written in English.[88]

The common law always permitted juries to convict defendants of manslaughter who were charged by indictment with murder.[89] Hale offered three related explanations for this practice.[90] First, he explained it in procedural terms as a form of special verdict in which the jury found the defendant guilty of part but not all of a charged offense.[91] Second, he explained it in more substantive terms by reasoning that the crime of manslaughter was necessarily committed in every murder.[92] Third, he reasoned that juries could convict of lesser crimes like manslaughter on indictments for murder because the two crimes "differ[ed] not in the kind or nature of the offense, but only in the degree . . . ."[93]

Such special verdicts or partial convictions were not limited to manslaughter. Hale wrote that juries could acquit of burglary, but convict of the felony that the defendant intended to commit within the dwelling; juries could acquit of robbery, but convict of larceny; juries could acquit of stabbing,[94] but

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PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 185-86 (P.R. Glazebrook ed., Prof'l Books 1971) (1736) (written in 1670s).

[87] *Id.* at 193.

[88] Blackstone describes the technical requirements for indictments. 4 WILLIAM BLACKSTONE, COMMENTARIES *306-07.

[89] *See* HALE, *supra* note 86, at 449.

[90] *Id.*

[91] *Id.*

[92] *Id.* Excuse defenses did not result in general verdicts of not guilty, but rather in special verdicts that set forth the circumstances. These led to pardons issued as a matter of course.

[93] *Id.*; *see also id.* at 466 (observing that murder differed substantively in "degree of the offense, murder being aggravated with malice presumed or implied, but manslaughter not . . . ."). An acquittal of murder barred an indictment for petit treason and vice-versa. HALE, *supra* note 86, at 246. A judgment of *attaint de murder* (resulting in outlawry) was also a bar to an indictment for the more serious crime of petit treason. *Id.* at 252.

[94] Homicide by stabbing was a capital offense, a felony not subject to benefit

convict of manslaughter; and juries could acquit of grand larceny, but convict of petty larceny.[95] In all these cases, the less serious crime was part of the more serious one because it was necessarily committed during the commission of the more serious crime, and because a close reading of the indictment showed that it contained language that framed a proper charge for the less serious offense.

Treatise writers in the 1800s worked up a general theory of lesser included offenses. Joseph Chitty explained:

> [T]he jury may frequently find the prisoner guilty only of a minor offence *included* in the charge, or a part of the offences there stated; and it is a general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified . . . .[96]

William Bishop's treatise, the required textbook on Criminal Law for a half century at the University of Mississippi School of Law,[97] attempted to give geometric precision to the relationship of different offenses. Bishop depicted some kinds of crimes by overlapping circles and others by concentric circles. Of those depicted by concentric circles, he observed: "Where offences are included within one another. . .a party indicted for any one of them may be convicted of any lower one; unless, what does not often happen, the allegation is such in form as does not properly charge the lower."[98]

Practitioners accepted the idea of lesser included offenses,

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of clergy. BLACKSTONE, *supra* note 88, at *193.

[95] HALE, *supra* note 86, at 302.

[96] 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *250 (from the last English edition of 1826).

[97] From 1857 to the turn of the century, Bishop's treatise served as the required textbook on criminal law at the University of Mississippi. *See* EDWARD MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 145 (Washington, Gov't Prtg. Office 1899). Mayes was L.Q.C. Lamar's son-in-law and served as dean of the law school and chancellor of the University.

[98] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 538, at 565 (1858); *see also id.* § 682 at 705. Similar generalizations of the doctrine of lesser included offenses were offered in other treatises. *See* WILLIAM L. CLARK, HANDBOOK OF CRIMINAL PROCEDURE § 122, at 403 (2d ed. 1918) ("The jury . . . may convict [the defendant] of any minor offense, included in the charge.").

referring to the "well-settled rule, that where a person is charged with a high offense, he may be convicted of a lower one of the same class."[99] Courts perceived the rule as an essential feature of the structure of crimes. In the absence of statutory authority, the Supreme Court in 1857 affirmed a conviction of attempt on a charge of desertion, reasoning:

> [W]hen the charge is of a higher degree, including one of a lesser, there may be a finding by a *partial verdict* of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault.[100]

Other decisions reflected the assumption that the doctrine was a more or less logical consequence of the principle that a greater crime *includes* the lesser.[101]

By the end of the 1800s, the term "lesser included offense" emerged as a term of art for such lesser crimes.[102]

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[99] Dynes v. Hoover, 61 U.S. 65, 72 (1857) (argument of counsel).

[100] *Dynes*, 61 U.S. 65, 80.

[101] *E.g.*, Brennan v. People, 15 Ill. 511, 518 (1854) ("An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment the jury may find the prisoner guilty of manslaughter."); *see also* Johnson v. State, 29 Ark. 31, 38-39 (1874) (quoting *Brennan*); Davis v. State, 39 Md. 355 (1874) (asserting argument of counsel referring to common law rule "that the lesser is included in the greater charge").

[102] Territory of Hawaii v. Schilling, 17 Haw. 249, 283 (Haw. 1906) (Frear, C.J., dissenting) (referring to rule that "there may be convictions of lesser included offenses under indictments of greater offenses"); State v. Taylor, 118 N.W. 747, 750 (Iowa 1908) (referring to defense request for jury instructions on "lesser included offenses" of larceny); Whitten v. State, 1909 Ohio Misc. 282 (Ohio Cir. Ct. 1909 (referring to larceny and assault as "included offenses in an indictment" for pickpocketing); Blythe v. State, 151 P. 488, 489 (Okla. Crim. App. 1915) (discussing alleged error in failure to instruct jury on "lesser included offense of shooting with intent to injure"); Love v. State, 150 P. 913 (Okla. Crim. App. 1915) (referring to "lesser included offense of shooting with intent to injure"); State v. Bickford, 147 N.W. 407 (N.D. 1913) (argument of counsel) ("[A] jury has the unquestioned right to convict for a lesser included offense.") (citing People v. Jefferson, 52 Cal. 452 (1877); People v. Barnhart, 59 Cal. 381 (1881); People v. Maroney, 41 P. 1097 (Cal. 1895), People v. Lowen, 42 P. 32 (Cal. 1896); People v. Muhler, 47 P. 128 (Cal. 1895); Phillips v. Territory, 1 Wyo. 82 (1872)); *In re* Friedrich, 51 F. 747, 748 (C.C.N.D. Wash. 1892) (referring to second degree mur-

Statutes were passed in many jurisdictions. They were intended to codify and extend the common law. For example, by designating the crime of attempt as a lesser included offense, such statutes resolved the uncertainty in some jurisdictions as to whether common law misdemeanors could qualify as lesser included attempts,[103] and they applied broadly to new statutory crimes. The most far reaching effort to codify lesser included offenses was undertaken in New York. First, the legislature subdivided serious felonies into different degrees.[104] Second, it provided:

> Upon an indictment for any offence consisting of different degrees, as prescribed in this Chapter, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence.[105]

The New York courts held that this statute merely supplemented the common law, and they applied the doctrine of lesser included offenses to crimes that were not designated by the

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der and "each lesser included crime, down to simple assault" of first degree murder); Ivey v. State, 154 P. 589, 591 (Wyo. 1916) ("Manslaughter is one of the lesser and included offenses of criminal homicide . . . .").

[103] *See* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 171-79 (1969) (discussing common law history of misdemeanor exception).

[104] An Act Concerning Crimes and Punishments, 2 N.Y. REV. STAT., pt. 4, ch. 1, tits. 1-2, at 657-63 (1829) (hereinafter cited as N.Y. REV. STAT. 1829); An Act Concerning Crimes and Punishments, 2 N.Y. REV. STAT., pt. 4, ch. 1, tits. 1-2, at 546-52 (1836) (hereinafter cited as N.Y. REV. STAT. 1836). The New York scheme was widely copied, including by Florida, Minnesota, Mississippi and Missouri. Missouri copied the New York criminal code, but followed the Pennsylvania practice of differentiating between first and second degrees of murder; *see also* An Act Concerning Crimes and Their Punishments, MO. REV. STAT., art. 2, § 1, at 167 (1840); *cf.* Plummer v. State, 6 Mo. 231, 241 (1840) (quoting involuntary homicide statute similar to Mississippi's).

[105] 2 N.Y. REV. STAT. 1829, *supra* note 104, tit. VII, § 27 (1829).

> When a defendant shall be acquitted or convicted upon an indictment for an offence, consisting of different degrees, as prescribed in this Chapter, he shall not thereafter be tried or convicted for a different degree of the same offence; nor shall he be tried or convicted for any attempt to commit the offence charged in the indictment, or to commit any degree of such offence.

Id. § 38.

legislature as different degrees of the same offense category.[106] The legislature later augmented the code to provide in more general terms that the jury was empowered to convict of any crimes "necessarily included" in the crimes charged in an indictment.[107]

The New York statutes were copied by many states,[108] including Mississippi,[109] and by the federal government.[110]

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[106] The New York court regarded the later amendment permitting conviction of "necessarily included" offenses as merely codifying established common law practice to the extent it escaped codification under the prior provision regarding degrees. "The next section (445) is new, and is the codification of that portion of the law which was not embraced in the section of the Revised Statutes just quoted, and it in no sense narrows the common-law rule . . . ." People v. McDonald, 1 N.Y.S. 703, 704 (1888).

[107] *See McDonald*, 1 N.Y.S. at 704 (discussing legislative history). The "necessarily included" language derived from drafts of the Field Code of criminal procedure. *E.g.*, *The Code of Criminal Procedure of the State of New York* [draft] § 502 (1850), *in* 2 N.Y. FIELD CODES 1850-1865 (1998). A number of states adopted the new definition before New York. *E.g.,* ALA. CODE § 3601 (1852). *See generally* Hoffheimer, *supra* note *. Mississippi adopted the language in 1857, *see infra* note 135, and Congress adopted it in 1872, *see infra* note 110.

[108] Nineteenth-century opinions from over one dozen states and territories quote statutes modeled after the New York statute authorizing convictions of lesser offenses "upon indictments for any offense consisting of different degrees." *E.g.*, Bob v. State, 29 Ala. 20 (1856); Pratt v. State, 10 S.W. 233 (Ark. 1888); People v. Wintermute, 46 N.W. 694 (Dakota 1875); State v. Fisher, 3 N.E. 379, 380 (Ind. 1885); State v. Cater, 69 N.W. 880, 881 (Iowa 1897); State v. Hodges, 26 P. 676, 678 (Kan. 1891); Patterson v. Commonwealth, 5 S.W. 387, 390 (Ky. 1887); People v. Repke, 61 N.W. 861, 863 (Mich. 1895); State v. Wiles, 4 N.W. 615, 616 (Minn. 1880); Morman v. State, 24 Miss. 54, 56 (1852); Territory v. Fox, 3 Mont. 440, 441 (1880); Muloy v. State, 78 N.W. 525, 527 (Neb. 1899); Lang v. State, 1 S.W. 318 (Tenn. 1886); Timmerman v. Territory, 17 P. 624, 625 (Wash. 1888); Cook v. Territory, 4 P. 887, 891 (Wyo. 1884). These cases demonstrate the influence of the New York legislation. More important, they reveal the universal assumption that offenses of lower degrees were lesser included crimes. Occasionally, states that did not designate offenses by degrees also copied New York's statute, and courts later fell into confusion in attempting to apply such statutes. *See infra* note 259, discussing the Michigan experience.

The "necessarily included" language from the draft Field Code, *see supra* note 107, was also adopted widely by states and territories. *Cf.* Kavanaugh v. State, 41 Ala. 399, 402 (1868) (citing penal code permitting conviction for "any offense which is necessarily included"); State v. Gordon, 3 Iowa 410, 413 (1856) (concluding defendant "may be found guilty of any offense necessarily included"); Wash. Terr. § 123, at 20 (1854) (cited in State v. Berlin, 947 P.2d 700, 701 (Wash. 1996)).

[109] *See infra* text accompanying note 128.

[110] The first federal statute dates from 1872 and provides:

The reception by American jurisdictions of the common law doctrine of lesser included offenses reduced the pleading burden on prosecutors by allowing convictions of lesser included offenses. Courts also recognized the right of defendants to request lesser included offense charges.[111]

B. Mississippi History

The Mississippi Criminal Code of 1839 borrowed most of its provisions from the New York Code. These codes embodied a new conceptual approach that valued rules of general application[112] and attempted to provide a systematic classification and hierarchy of all crimes. They eliminated older forms of special homicide offenses, such as petit treason,[113] and created four separate degrees of manslaughter,[114] four degrees of arson,[115] three degrees of burglary,[116] four degrees of

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> [I]n all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged . . . .

Act of June 1, 1872, ch. 255, § 9, 17 Stat. 196, 198 (repealed 1944). The federal statute was replaced in 1944 by Rule 31 of the Federal Rules of Criminal Procedure, which retains the operative language that a defendant "may be found guilty of any offense necessarily included in the offense charged." FED. R. CRIM. P. 31(c). *See generally* Walter W. Jones, Jr., Annotation, *What Constitutes Lesser Offenses "Necessarily Included" in Offense Charged Under Rule 31(c) of Federal Rules of Criminal Procedure*, 11 A.L.R. FED. 173 (1972) (Supp. 2003).

[111] Stevenson v. United States, 162 U.S. 313 (1896) (dictum); United States v. Carr, 25 F. Cas. 306 (S.D. Ga. 1872).

[112] The code eliminated older special provisions dealing with different methods of killing and provided that "[t]he killing of a human being, without the authority of law, by poisoning, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case."

Act of Feb. 15, 1839, tit. II, § 3, 1839 Miss. Laws 105 (enacting penitentiary code) [hereinafter cited as MISS. PENITENTIARY CODE 1839], copied from 2 N.Y. REV. STAT. 1829, *supra* note 104, pt. 4, ch. 1, tit. 1, § 4.

[113] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. II, § 7 (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, pt. 4, ch. 1, tit. 1, § 8.

[114] First degree was punishable by imprisonment for seven years; second degree by four to seven years; third degree by two to four years; fourth degree by up to two years. MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. III, §§ 20-21. For the history and elements of these offenses, see generally Hoffheimer, *supra* note 85, at 60-72.

[115] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. II, § 8; tit. IV, art. 1,

forgery[117] and two degrees of robbery.[118]

The purpose of the division of crimes into degrees was to establish a hierarchy of crimes suitable for different levels of punishment. To achieve this end, statutes typically defined different degree crimes in alternative terms that tended to emphasize their differences rather than their commonalities.

For example, first degree burglary was defined as breaking and entering the dwelling house of another at night with the intent to commit some crime.[119] It required forcibly breaking the structure, forcing a lock or carrying a dangerous weapon.[120] Second degree burglary was not defined inclusively as the same offense without a time element. Rather it was defined in alternative terms as a similar offense committed in the daytime.[121] First degree robbery was defined as theft from a person either by violence or by putting the person in fear of immediate injury to his person, while second degree robbery was defined in alternative terms as theft from a person by fear of some injury to the person, the person's family or the person's property that was threatened to be inflicted in the future.[122]

In some instances, crimes of lesser degree were new crimes added to original common law offenses. For example, lesser degrees of burglary and robbery defined crimes that did not meet the common law definitions of the felonies. But, the division of other crimes like manslaughter and arson into degrees did not follow this pattern.

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§§ 1-9 (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, pt. 4, ch. 1, tit. III, § 8); *id.* tit. IV., art. 1, §§ 1-9. First degree arson was a capital offense; the others were punishable by increasing terms of imprisonment.

[116] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. II, §§ 10-21 (copying from 2 N.Y. REV. STAT. 1829, *supra* note 104, chap. 1, tit. IV, art. II, §§ 10-21). No degree of burglary was eligible for capital punishment.

[117] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. III, § 42 (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, ch. 1, tit. IV, art. III, § 42). No degree of forgery was eligible for capital punishment.

[118] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. V, § 57 (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, ch. 1, tit. IV, art. V, § 57). No degree of robbery was eligible for capital punishment.

[119] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. III, § 10.

[120] *Id.*

[121] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. II, § 11.

[122] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. IV, §§ 56-57.

The 1839 Criminal Code established the practice by which most crimes, including lesser included offenses, were defined in alternative rather than inclusive terms. Attempt was defined in terms that presented it as an alternative to the attempted offense rather than as an offense included in such an offense.[123] Grand larceny was defined as theft of property of a certain value "or more,"[124] while petit larceny was defined as theft of property "under" that value.[125] Age requirements for victims were described in alternative terms.[126]

The definition of crimes in alternative ways intensified the need for specific gap fillers. The difficulty in proving that a dog was personal property and that it was either above the statutory amount or below that amount evidently led to enactment of the crime of larceny of a dog, where no showing of the dog's value was required. The problem with the gap filler is obvious. It does not apply to cats.[127]

Crimes of lesser degree were by definition lesser included offenses. This legal effect formed the working understanding of the legislature in classifying related offenses. The code provided:

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[123] The 1839 Criminal Code stated:

> Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or incapacitated in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished [as provided by statute]. . . .

MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. VIII, § 3 (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, ch. 1, tit. VII, § 3). The purpose of the alternative language was made clear by statutes that explicitly provided that persons could not be convicted both of attempt and a completed offense. MISS. CODE ANN. § 97-1-9 (2000). For another statute, still in effect, based on the New York model, see KANS. STAT. ANN. § 21-3101 (2003).

[124] MISS. CODE ANN. § 97-17-41 (Supp. 2004) (setting value currently at $500). The original monetary amount was "value of more than twenty-five dollars." MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. IV, art. V, § 63.

[125] MISS. CODE ANN. § 97-17-43 (Supp. 2004).

[126] *See infra* text accompanying note 289 (discussing different forms of statutory rape or sexual battery of child).

[127] MISS. CODE ANN. § 97-17-51 (2000). The code is full of such gap fillers; *see, e.g.*, *id.* § 97-17-49 (prohibiting theft of wool from dead sheep but not llama); *id.* § 97-17-55 (prohibiting theft of milk from milk-cow but not from nanny goat).

> Upon an indictment for any offence consisting of different degrees, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person, guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such an offence.[128]

Jeopardy attached to all crimes of the same degree so that a defendant acquitted or convicted of a crime could not be prosecuted again for the same offense in a different degree[129]

As in New York, code provisions assured both that less serious offenses were punished less seriously and guaranteed that, even when the statutes defined crimes of different degrees in alternative terms that excluded each other, such crimes were treated as lesser included offenses.[130]

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[128] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. VIII, § 22, (copying 2 N.Y. REV. STAT. 1829, *supra* note 104, tit. VII, § 27). *See supra* text accompanying note 105 (quoting New York statute). Legislation also provided:

> No person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit an offence, when it shall appear that the crime intended, or the offence attempted, was perpetrated by such person at the time of such assault, or in pursuance of such attempt.

MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. VIII, § 21.

[129] MISS. PENITENTIARY CODE 1839, *supra* note 112, tit. VIII, § 23 states:

> When a defendant shall be acquitted or convicted, upon any indictment, for an offence consisting of different degrees, he shall not, thereafter, be tried or convicted of a different degree of the same offence; nor shall he be tried or convicted of any attempt to commit the offence charged in the indictment, or to commit any degree of such offence.

Id.

[130] This could generate confusion under the elaborate degrees. Thus a defendant indicted of first degree arson (which required proof of arson of a dwelling while it was occupied) might be convicted of third degree arson under circumstances where the indictment did not sufficiently alert the defendant of the case against him. The court reversed such a conviction despite the statute that seemed to permit it, and held that a defendant could be convicted of lesser included offenses under the statute only when the indictment for the higher degree alleged sufficient additional circumstances so that the indictment described an inferior degree offense. Dedieu v. People, 22 N.Y. 178 (1860). The court subsequently rejected the argument that the statute permitted convictions for lesser offenses only when their elements were expressly included in the allegations of the greater offense. Keefe v. People, 40 N.Y. 348, 356 (1869). It concluded that this restrictive construction would have rendered the statute unnecessary and that the statute was intended to apply more broadly to crimes of the same class ranked together

The exact meaning of degrees was never settled. Crimes designated as having degrees by statute obviously qualified. It was less certain whether the term was meant to embrace common law crimes like manslaughter, which were traditionally understood as being of lesser degree of a more serious crime,[131] or whether it extended to new crimes (e.g., petit larceny or larceny of dogs) that were not designated as being a lesser degree of the more serious crime.

The Mississippi Supreme Court decided that "degree," as stated in the statute, applied only to those crimes specifically designated by statute as differing in degree.[132] But the court also held that the statute did not displace the common law rule permitting conviction of lesser included offenses.[133] Although broad, this construction prevented the court from finding an offense to be a lesser included offense that was neither so recognized at common law nor designated as a lesser degree by statute—with unfortunate results.[134]

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by degree. *Keefe*, 40 N.Y. at 357.

[131] *See supra* text accompanying note 93 (discussing Hale's characterization of manslaughter as lesser degree of homicide).

[132] Morman v. State, 24 Miss. 54, 56 (1852).

> This section of the law is obviously applicable only to that class of offences which, under the statute, consists of different degrees, and in which the conviction is for the same offence, but in a different degree from that charged in the indictment, and is very far from authorizing a verdict for a different crime or offence than that of which the accused is charged.

Morman, 24 Miss. at 56.

[133] King v. State, 6 Miss. 730, 735 (1841).

> By the common law, there are several classes of criminal cases, where the accused may be acquitted of the crime charged, but found guilty of an inferior degree of the same offence; as in the case of murder, burglary, grand larceny, and assault and battery; and the statute in question having created several new degrees of offences, it was reasonable and proper, that the provisions contained in the said twenty-second section should have been made; and the rule there laid down, merely carries out, extends, and recognizes the rules and principles of the old law, and adapts them to the new grades of offence created, for the first time, by the provisions of the new criminal code . . . .

King, 6 Miss. at 735.

[134] In *Morman*, 24 Miss. at 54, the court reversed a conviction of assault with intent to commit manslaughter, holding that the crime was not an inferior degree of the charged crime of assault with a deadly weapon with intent to murder.

Such problems were reduced when Mississippi broadened its statutory definition to the statutory language so as to embrace all "inferior" and other crimes "necessarily included" in the crimes charged in the indictment. In 1857, Mississippi adopted the precursor of the current statute, which provides:

> On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.[135]

The unmistakable purpose of this revision was to codify the broadest possible understanding of lesser included offenses.

The subdivision of crimes into degrees proved unworkable, and, by the mid twentieth century, few states that adopted New York's multiple degrees of manslaughter, burglary, robbery, and arson, retained them. Today, only the degrees of arson survive in Mississippi as reminders of this legal past.[136] Curiously, a few states retain their early nineteenth-century statutes defining lesser included offenses as crimes of lesser degrees.[137]

C. *Murder, Manslaughter, and the Constitutionality of the 2004 Amendments*

Just as manslaughter was always a lesser included offense of murder at common law,[138] Mississippi has, except briefly in 2003-04, consistently treated its various forms of manslaughter as lesser included offenses of murder.

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[135] MISS. CODE ANN. § 99-19-5(a)(1) (2000 & Supp. 2004). The current form of this statute was adopted as part of the code revision of 1857. *See* MISS. REV. CODE ch. 64, § 62, art. 305 (1857).

[136] MISS. CODE ANN. §§ 97-17-1 to -9 (2000 & Supp. 2004) (defining arson crimes in four degrees).

[137] *Cf.* State v. Shepherd, 477 N.W.2d 512, 516 (1991) (citing MINN. STAT. § 609.04 subd. (1)(1) (1990)) ("[I]ncluded offense may be . . . [a] lesser degree of the same crime . . . .").

[138] *See supra* text accompanying notes 89-93.

In the 1841 case of *King v. State*,[139] the defendant was indicted for murder but found guilty of manslaughter.[140] The defendant appealed, arguing that the state constitution and the "degree" language of the 1839 statute failed to authorize such a conviction.[141] The court affirmed, noting that while the statute may not have applied, the statute did not displace the common law rule authorizing manslaughter convictions on murder indictments.[142]

Many Mississippi decisions affirmed manslaughter convictions returned on murder indictments.[143] After the enactment of capital murder, the court likewise held that murder was a lesser included offense of capital murder.[144] Indeed, in a 1985 case where the defendant argued that the state must elect between murder and manslaughter and that charging both murder and manslaughter under an indictment for murder failed to provide adequate notice, the court not only affirmed the murder conviction but observed that there was absolutely no authority for the defendant's argument.[145]

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[139] King v. State, 6 Miss. 730, 730 (1841).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 732. In *Swinney v. State*, 16 Miss. 576 (1847), the court affirmed a conviction of larceny where the state had failed to prove all the facts alleged in the indictment, but nevertheless proved enough facts to prove the necessary elements. The court relied on the treatment of manslaughter as a lesser included offense in its opinion. *Swinney*, 16 Miss. at 585.

[143] *E.g.*, Kelly v. State, 463 So. 2d 1070, 1073 (Miss. 1985) (citations omitted) ("This court has repeatedly applied the general rule and upheld convictions of manslaughter obtained under an indictment for murder."); Wells v. State, 305 So. 2d 333 (Miss. 1974); Roberson v. State, 257 So. 2d 505, 508 (Miss. 1972) (affirming manslaughter conviction on murder indictment and observing that the "indictment for murder includes the charge of manslaughter"); King v. State, 168 So. 2d 637 (Miss. 1964); Triplett v. State, 132 So. 448 (Miss. 1931) (affirming manslaughter conviction on murder indictment); Calicoat v. State, 95 So. 318 (Miss. 1922); Huston v. State, 62 So. 421, 422 (Miss. 1913) (affirming manslaughter conviction and observing "[u]pon an indictment charging murder, the person charged may be legally convicted of manslaughter, provided there is evidence justifying the belief that the defendant is guilty of the lesser crime."); Traube v State, 56 Miss. 153 (1878) (affirming manslaughter conviction); Marsh v. State, 30 Miss. 627 (1856) (affirming manslaughter conviction on murder indictment); Dyson v. State, 26 Miss. 362 (1853); McCarty v. State, 26 Miss. 299 (1853) (affirming manslaughter conviction returned on murder indictment); Goodwyn v. State, 12 Miss. 520 (1845) (affirming manslaughter conviction on murder indictment); *see also* Allen v. State, 104 So. 353 (Miss. 1925) (reversing murder conviction where instructions improperly directed jury to either convict of murder or acquit without permitting manslaughter conviction); Brown v. State, 54 So. 305 (Miss. 1910) (reversing conviction due to prejudicial comment on evidence but opining that manslaughter conviction on murder indictment was proper); Riggs v. State, 30 Miss. 635 (1856) (affirming murder conviction but observing, "[i]t is well settled, that, under our laws, a party indicted for murder may be convicted of any degree of manslaughter . . . ."); Brown v. State, 32 Miss. 433 (1856) (reversing manslaughter conviction on murder indictment on other grounds); Williams v. State,

The court has offered a variety of reasons for this policy. It has reasoned that defendants faced with possible murder convictions cannot complain if they are convicted of manslaughter.[146] It has reasoned that murder and manslaughter are different degrees of felonious homicide.[147] It has reasoned that "murder includes the charge of manslaughter."[148] Because the

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32 Miss. 389 (1856) (reversing manslaughter conviction on murder indictment on other grounds); Jenkins v. State, 30 Miss. 408 (1855) (reversing manslaughter conviction on murder indictment where case tried in wrong county); Turner v. State, 28 Miss. 684 (1855) (reversing manslaughter conviction on murder indictment because death occurred in wrong county).

[144] Harveston v. State, 493 So. 2d 365 (Miss. 1986); Biles v. State, 338 So. 2d 1004 (Miss. 1976).

[145] *Kelly*, 463 So. 2d at 1072-73. The court specifically rejected the argument that such procedure violated notice requirements under the federal and state constitution. *Id.*

[146] *E.g.*, Huffman v. State, 6 So. 2d 124, 126 (Miss. 1942) ("We have held repeatedly that when the evidence would justify a conviction of murder, the defendant may not complain of a conviction of the lesser offense of manslaughter, nor of an instruction covering such offense.") (citing Holmes v. State, 4 So. 2d 540 (Miss. 1941); *see also* Triplett v. State, 132 So. 448 (Miss. 1931):

> The jury might well have returned a verdict for murder. They, however, saw fit to convict the appellant of the lesser crime, manslaughter, which does credit to their sensibilities whatever may be thought of their ability of ratiocination. That the appellant escaped conviction of the crime of which, according to the testimony on behalf of the state, he is obviously guilty should be cause for might self-felicitation.

Id.

[147] Jones v. State, 109 So. 265, 268 (Miss. 1926) ("[Manslaughter] being an unlawful transgression of the law against homicide, it may properly be considered a lesser degree of homicide, and . . . a jury, under an indictment for murder, may properly return in proper cases a verdict of involuntary manslaughter.").

[148] Roberson v. State, 257 So. 2d 505, 508 (1972) (citing King v. State, 168 So. 2d 637 (Miss. 1964)); Calicoat v. State, 95 So. 318 (Miss. 1922); Dyson v. State, 26 Miss. 362 (1853); Kelly v. State, 11 Miss. 518 (1844); King v. State 5 How. 730 (Miss. 1841); *see also* Street v. State, 43 Miss. 1 (1870) (reviewing denial of

rule was so firmly established, prosecutors routinely indicted for murder even when they sought manslaughter convictions, and they rarely added a separate manslaughter charge.[149]

Over time, some members of the Mississippi Supreme Court employed the elements test and suggested in dicta that manslaughter might be classed as a lesser related offense of murder.[150] These opinions encouraged Justice McRae to reach the conclusion in the initial *Shaw* decision that manslaughter was not a lesser included offense of murder, provoking a crisis by disapproving longstanding prosecutorial practice, and requiring separate indictments for murder and manslaughter.[151]

Even before the court reversed course and withdrew its initial opinion, undesirable consequences of its decision were removed by the 2004 amendments to the murder statute that designate that an indictment for murder serves as notice that the defendant may be tried for manslaughter or other lesser included offenses. The amendments provide: "An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter."[152] The amendments also supplement the statute that

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bail in homicide case) ("The facts in the record do not raise the question of the degree of the crime—murder or manslaughter. On that subject there can be no doubt. And as manslaughter is included in an indictment for murder—and a conviction of the lesser offense can be sustained under a charge of the greater. . ."); *see generally* State v. Shaw, 880 So. 2d 296, 304 (Miss. 2004) ("We have consistently held that an indictment for murder includes the lesser-included charge of manslaughter.") (citing Kelly v. State, 463 So. 2d 1070, 1073 (Miss. 1985)); Hester v. State, 841 So. 2d 158, 162 (Miss. Ct. App. 2002). This part of the opinion incorporates the text from *State v. Shaw*, 2001-KA-01854-SCT, ¶ 38 (Miss. 2003) (Waller, Smith, Cobb, JJ., dissenting), *withdrawn*, 880 So. 2d 296 (Miss. 2004).

[149] The court referred to this practice in discussing the difficulty of determining whether an offense was bailable. *Street*, 43 Miss. at 30 ("The prosecuting officer very often prefers but one count for murder, when the crime intended to be imputed is murder in the second degree, or manslaughter.").

[150] Justice Carlson helpfully assembled a comprehensive catalog of opinions that refer to manslaughter both as a lesser included and as a lesser related but non-included offense of murder. State v. Shaw, 880 So. 2d 296, 307-10 (Miss. 2004) (Carlson, J., dissenting).

[151] State v. Shaw, 2001-KA-01854-SCT (Miss. 2003), *withdrawn*, 880 So. 2d 296 (Miss. 2004).

[152] MISS. CODE ANN. § 97-3-19(3) (Supp. 2004).

sets forth the requirements for homicide indictments to remove any doubts: "An indictment for murder or capital murder shall be sufficient to also charge the lesser offense of manslaughter without a specific allegation of such lesser crime and without any necessity for an additional count charging such lesser crime."[153] They added a section to the lesser included offenses statute to provide:

> For purposes of this section, manslaughter shall be considered a lesser included offense of murder and capital murder, and the jury may be properly instructed thereon, upon request by either party or upon the court's own motion, in any case in which the giving of such instruction would be justified by the proof, consistent with the wording of the applicable manslaughter statute.[154]

These amendments taken together express the legislature's goal of restoring the treatment of manslaughter as a lesser included offense of murder.

The only obstacle to the resumption of the longstanding treatment of manslaughter as a lesser included offense is the possibility that Justice McRae's ruling was constitutionally grounded and, hence, beyond the power of legislative correction. Justice McRae based his decision in part on the requirement in the state constitution that an indictment notify defendants of the charges against them.[155] He contended that a murder indictment did not provide sufficient notice of a man-

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The legislature may not have believed it was merely restating existing law because the House Bill version provided that the amendments would go into effect prospectively after July 1, 2004. *See* H.B. 1559, 2004 Reg. Sess. § 4 (Miss. 2004) *available at* http://billstatus.ls.state.ms.us/documents/2004/html/HB. The version that was sent to the Governor provided that the act "shall take effect and be in force from and after its passage." S.B. 2438, 2004 Reg. Sess. § 4 (Miss. 2004) *available at* http://billstatus.ls.state.ms.us/documents/2004/html/SB.

The effective date of adoption is April 20, 2004, and Justice Carlson rightly observed that the amendment "took effect from and after its passage and is not retroactive." *Shaw*, 880 So. 2d at 307 (Carlson, J., dissenting).

[153] MISS. CODE ANN. § 99-7-37(2) (Supp. 2004).

[154] *Id.* § 99-19-5(2).

[155] MISS. CONST. art. 3, §§ 26-27, *cited in* State v. Shaw, 2001-KA-01854-SCT, ¶ 8 (Miss. 2003), *withdrawn*, 880 So. 2d 296 (Miss. 2004).

slaughter charge for two separate reasons.[156]

First, Justice McRae reasoned that manslaughter had different elements from murder, so a defendant might be surprised to learn that he was being tried for manslaughter when he or she was charged with murder.[157] The history set forth in this Article demonstrates that concern about surprise was misplaced even under the law prior to the 2004 amendments. The unbroken tradition of treating manslaughter as a lesser included offense of murder must have eliminated any surprise. The 2004 amendments now provide ample public notice that murder indictments also charge manslaughter.[158]

Second, Justice McRae reasoned that a defendant might be prejudiced in defending a murder charge due to the state's failure to raise manslaughter.[159] He suggested that a defendant might introduce exculpatory evidence of the lack of malice required for murder by showing the presence of heat of passion,[160] but he protested that such exculpatory evidence would become inculpatory if the state added a manslaughter charge.[161] Justice McRae's second concern was misplaced because under established homicide practice the defendant's assertion that he lacked malice due to provocation would not be a complete defense but rather might mitigate murder liability to manslaughter.[162]

In other words, Justice McRae's concern about notice was just a manifestation of his personal conviction that the state must pursue only one theory of homicide and that its failure to secure a conviction on its chosen theory should entitle the defendant to an acquittal of all homicide crimes. This all-or-nothing approach was rejected by the court in other procedural contexts[163] and lacks either legal or historical authority. In addition to its lack of authority, there are substantive objections to requiring such an all-or-nothing choice. First, it makes no sense to reward a criminal by releasing him from all criminal liability just because the state has failed to prove all of the elements of one crime. Second, eliminating manslaughter as a lesser included offense of murder would not achieve the desired result. If manslaughter were not a lesser included offense, the state could prosecute manslaughter separately.[164] The best way to prevent the state from pursuing multiple, inconsistent theories of homicide is to treat manslaughter as a lesser included offense of murder, and murder as a lesser included offense of capital murder—the rule restored by the legislative amendments.

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[156] *Id.* ¶ 15.

[157] *Id.* ¶ 16 ("Notice to a defendant that he is required to defend against the elements of murder does not provide notice that he may too be required to defend against the elements of manslaughter.").

[158] *See* State v. Shaw, 880 So. 2d 296, 307 (Carlson, J., dissenting).

[159] State v. Shaw, 2001-KA-01854-SCT, ¶ 16 (Miss. 2003) ("If Shaw's defense to murder was based on lack of malice or mere negligence, would he not be prejudiced by the State being allowed to proceed on the unindicted charge of manslaughter which required no malice and which can be based on negligence?"), *withdrawn*, 880 So. 2d 296 (Miss. 2004).

[160] "Under the present facts Shaw's defense of lack of malice would not have been available to him if the State had been allowed to proceed on a charge of manslaughter, which does not require malice." *Shaw*, 2001-KA-01854-SCT, ¶ 14, *withdrawn*, 880 So. 2d 296 (Miss. 2004).

[161] *Id.*

[162] *Id.*

Justice McRae's decision was not required by the indictment or notice requirements in the state constitution. Accordingly, on grounds of both history and policy, there can be no question that the 2004 amendments are constitutional.

III. DIFFERENT TESTS

A. *Defining the Tests*

During the twentieth century courts agreed that lesser included offenses were those crimes that were necessarily committed during the commission of a charged offense. But this definition incorporated an ambiguity of which courts were not originally aware.

The ambiguity becomes obvious in a case where the defendant shoots and kills a victim with a gun, and the question is raised whether the crime of assault with a deadly weapon is a lesser included offense of murder. In the particular case, it would be impossible to commit murder without committing the lesser crime. But not all forms of murder would require the commission of the lesser crime, so it would be possible in theory to commit the greater crime without committing the lesser one.

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[163] *See, e.g.*, Arthur v. State, 735 So. 2d 213 (Miss. 1999) (McRae, J., dissenting).

[164] Any admissions about heat of passion made in defense of the murder charge would become admissible against defendant to support a conviction for manslaughter. *See* MISS. R. EVID. 801(d)(2) (omitting admission of party opponent from hearsay definition); MISS. R. EVID. 804(b)(3) (including statements against interest as exceptions to hearsay).

As courts became aware of this ambiguity, they developed three different tests for deciding whether a crime was a lesser included offense. Under the pleadings test, courts looked at how the greater crime was described in the formal charge. Under the evidence test (or the "cognate evidence approach") courts looked at the inculpatory evidence introduced at trial. Under the elements test, courts looked only at the legal definition of the crimes.

Under the pleadings test, assault with a deadly weapon would be a lesser included offense of murder if the formal charge sets forth allegations that include the elements of that crime. Under the evidence test, assault with a deadly weapon would be a lesser included offense if the state relies on evidence of conduct that establishes the lesser crime. Under the elements test, assault with a deadly weapon would not be a lesser included offense of murder because it has at least one element (use of deadly weapon) not required for murder.

B. *Mississippi's Approach*

Mississippi courts have repeatedly stated their adherence to a general definition of lesser included offenses under which: "the more serious offense must include all the elements of the lesser offense, that is, it is impossible to commit the greater offense without at the same time committing the lesser-included offense."[165] Alternatively, "[t]he lesser included offense must not require some additional element not needed to constitute the greater offense."[166]

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[165] Friley v. State, 879 So. 2d 1031 (Miss. 2004) (quoting Hailey v. State, 537 So. 2d 411, 415 (Miss. 1988)).

[166] *Hailey*, 537 So. 2d at 418 (Robertson, J., concurring).

In applying this definition, Mississippi courts have decided whether crimes are lesser included offenses in individual cases and have avoided adopting a specific test.[167] To the extent they considered competing tests, they sometimes applied both the pleadings approach and the elemens test.[168]

Until Justice McRae's initial opinion in *Shaw*, there was no unambiguous authority for the elements test, and the supreme court's withdrawal of that opinion leaves its endorsement of the elements test in question. Although the court's reversal of its position in the case may suggest its repudiation of the elements test, its final opinion retained language compatible with the test. The second, substituted decision in *Shaw* does not remove uncertainty because the decision amalgamates text from the withdrawn majority and dissent to support the assertion that manslaughter is a lesser included offense of murder. However, the decision does not adequately explain what theory supports that conclusion.[169]

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[167] This is apparently deliberate. In *Friley*, the court of appeals discussed competing tests for lesser including offenses, but the supreme court avoided discussing those tests while holding under the particular facts of the case that unlawful touching was a lesser included offense of sexual battery. *Friley*, 879 So. 2d at 1034-35. *See infra* notes 158-76 and accompanying text.

[168] *See Hailey*, 537 So. 2d at 411 (holding that unlawful touching (fondling) of a child was not lesser included offense of forcible rape after analyzing both indictment and elements of offenses). The holding in *Hailey* was relied on by the court of appeals in concluding that unlawful touching of a child was not a lesser included offense of sexual battery. Brady v. State, 722 So. 2d 151, 158 (Miss. Ct. App. 1998); *see also Friley*, 856 So. 2d at 654, *rev'd*, 879 So. 2d at 1031. But forcible rape obviously has different and additional elements from unlawful touching, and the court in *Hailey* was especially concerned that the charge did not provide adequate notice of possible trial on the lesser offense. *Hailey*, 537 So. 2d at 417. It is harder to see how a defendant charged with sexual battery (of a minor) would be surprised or prejudiced by a submission of a charge of unlawful touching. The dissenting judges on the court of appeals in *Friley* argued that *Hailey* did not provide compelling authority for rejecting unlawful touching of child as a lesser included offense of sexual battery. *Friley*, 856 So. 2d at 665 (Griffis, Myers, Chandler, JJ., dissenting). The supreme court reversed, holding that "molestation may be a lesser-included offense to some types of sexual battery." *Friley*, 879 So. 2d at 1034. *See infra* notes 171-73, 183-87, discussing case.

[169] Indeed, the opinion suggests that manslaughter may be a lesser included offense because all the elements are included, despite the fact that the proof of such elements is inconsistent with proof of the inclusive elements of the greater crime. *See supra* note 10.

Other decisions are difficult to reconcile with the elements test, such as Justice McRae's own opinion that aggravated DUI was a lesser included offense of manslaughter.[170] Most important is the supreme court's recent decision in *Friley v. State*, holding that unlawful touching of a child can be a lesser included offense to some forms of sexual battery.[171] Because the statutory elements of sexual battery do not invariably include those of unlawful touching,[172] and because the supreme court looked beyond the statutory definitions to consider "reasonable inference[s] from the circumstances"[173] in which the crime was committed, *Friley* provides strong authority that the supreme court will not limit itself to the elements test. In other decisions incompatible with the elements test the court has held that possession of marijuana[174] and possession and delivery of marijuana are lesser included offenses of selling marijuana.[175] A questionable line of cases holds that resisting arrest is a lesser included offense of assault despite different elements.[176]

In addition, the supreme court has rejected classing certain offenses as lesser included offenses that might satisfy the elements test. For example, some older cases hold that assault with intent to kill is not a lesser included offense of murder.[177] A line of authority, recently reaffirmed, holds that simple assault is not a lesser included offense of murder,[178] though this Article argues that assault should be a lesser included offense of murder under the 2004 amendments. Other decisions have found that assault is a lesser included offense of attempted rape,[179] and older decisions held that simple assault was a lesser included offense of assault with intent to kill.[180]

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[170] Mayfield v. State, 612 So. 2d 1120, 1125 (Miss. 1992); Craig v. State, 520 So. 2d 487, 492 (Miss. 1988) (holding aggravated DUI lesser included offense of culpable negligence manslaughter). *See supra* note 2.

[171] *Friley*, 879 So. 2d at 1035.

[172] The elements of the respective crimes were discussed thoroughly by the court of appeals. *See infra* note 183, identifying elements of crimes.

[173] *Friley*, 879 So. 2d at 1035.

[174] Laughter v. State, 241 So. 2d 641 (Miss. 1970). *But see* Sanders v. State, 479 So. 2d 1097 (Miss. 1985) (holding that crimes of transferring cocaine and possessing cocaine with intent to transfer were not lesser included offenses of crime of selling cocaine, but rather alternative crimes under the statute, so indictment under one did not properly charge the other).

[175] Jones v. State, 279 So. 2d 650 (Miss. 1973). It might be possible in some cases to sell without having actual possession or personal delivery.

[176] Murrell v. State, 655 So. 2d 881, 886 (Miss. 1995); McDonald v. State, 784 So. 2d 261 (Miss. Ct. App. 2001); Barber v. State, 743 So. 2d 1054 (Miss. Ct. App. 1999). There are good reasons for classifying resisting arrest as a lesser related, rather than lesser included, offense. *See McDonald*, 784 So. 2d at 263 (Southwick, J., concurring); *Barber*, 743 So. 2d at 1056 (Southwick, P.J., dissenting) (questioning characterization of resisting arrest as lesser included offense and arguing that it was rather lesser related offense).

Judge Southwick of the Court of Appeals of Mississippi provided the best discussion of the Mississippi definition of lesser included offenses. Observing that Mississippi had defined a lesser included offense as a crime that "must contain all the elements of the greater, such that it would be impossible to commit the greater without also committing the lesser,"[181] he addressed the uncertainty of "whether the focus should be on the statutory elements of the offenses or instead on the specific facts of a particular case."[182]

The court of appeals faced the question of whether the crime of unlawful touching (fondling) of a child was a lesser included offense of sexual battery. Judge Southwick identified two elements that were required for unlawful touching but not required for the form of sexual battery with which the defendant was charged: a defendant had to be over eighteen and had to act with the specific intent of gratifying lust.[183]

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[177] Bell v. State, 115 So. 896 (1928); Scott v. State, 60 Miss. 268 (1882).

[178] *E.g.*, Harris v. State, 723 So. 2d 546 (Miss. 1997); Moore v. State, 59 Miss. 25 (1881); Fulcher v. State, 805 So. 2d 557, 560-61 (Miss. Ct. App. 2001); *see also* Wolfe v. State, 743 So. 2d 380, 387 (Miss. 1999) (Banks and Mills, JJ., dissenting).

[179] Armstead v. State, 503 So. 2d 281 (Miss. 1987); *see also* Grayer v. State, 519 So. 2d 348, 440 (Miss. 1988) (holding assault with intent to rape was sufficiently lesser included offence to forcible rape to support plea-bargained judgment of lesser offense despite fact that it required additional element with respect to previous chaste character of victim).

[180] Bedell v. State, 50 Miss. 492 (1874).

[181] Friley v. State, 856 So. 2d 654, 656 (Miss. Ct. App. 2003) (Southwick, J. concurring) (citing Sanders v. State, 479 So. 2d 1097, 1108 (Miss. 1985)), *rev'd*, 879 So. 2d 1031 (Miss. 2004).

[182] *Friley*, 856 So. 2d at 656-57 (Southwick, J., concurring), *rev'd*, 879 So. 2d 1031 (Miss. 2004).

[183] The subsection of the sexual battery statute with which defendant was

According to Judge Southwick, the general language in Mississippi opinions defining a lesser included offense might provide authority for either the pleadings test or the elements test; he reasoned that the language of the opinions was not compatible with the evidence test.[184] He concluded in the case before the court that it was unnecessary to decide which test applied because under neither test did the greater crime contain the element of specific intent required for the lesser crime of unlawful touching.[185]

Three dissenting judges concluded, on the contrary, that unlawful touching of a child was a lesser included offense despite the different statutory language employed to describe the mental states for the offenses and despite the fact that the more serious crime required only general intent while the less serious crime required specific intent. The dissent argued cogently that a defendant committing the more serious crime of sexual battery would, in reality, always be acting with the culpable mental state required for the lesser included offense.[186] The dissent insisted that treating unlawful touching as a lesser-included offense would "give proper construction to these statutes that provide for progressive punishment for progressively worse crimes."[187]

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charged requires the state to prove sexual penetration of a child under fourteen by a defendant at least two years older than the victim. MISS. CODE ANN. § 97-3-95(d) (2000). Unlawful touching requires the state to prove the defendant was at least eighteen, acted for the purpose of gratifying lust, and touched a victim younger than sixteen. MISS. CODE ANN. § 97-5-23 (2000).

[184] "I find no support in this State's precedents for the 'cognate evidence' rule." *Friley*, 856 So. 2d at 659 (Southwick, J. concurring), *rev'd*, 879 So. 2d 1031 (Miss. 2004).

[185] *Id.* (Southwick, J. concurring).

[186] *Id.* at 665 (Griffis, Myers, Chandler, JJ., dissenting) ("I can see no instance where a person would [commit an act of 'sexual penetration' prohibited by statute] that would not be for the 'purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires' [as required for unlawful touching]."). This was especially true given the judicial restriction of "sexual penetration" to acts that were motivated by libidinal gratification. *Id.* A similar protest was lodged by the dissent in *Hailey v. State*, 537 So. 2d 411, 419 (Miss. 1988) (Griffin and Anderson, JJ., dissenting) ("I reiterate that I cannot understand how one could be guilty of rape and at one and the same time not be guilty of the lesser offense of fondling.").

[187] *Friley*, 856 so. 2d at 666 (Griffis, Myers, Chandler, JJ., dissenting).

The supreme court reversed the decision of the court of appeals and agreed with the conclusion reached by the dissent.[188] Though the supreme court did not provide a full explanation, its holding in *Friley* is flatly incompatible with the elements test for reasons that Judge Southwick explained.

The legislature's response to the initial *Shaw* decision repudiates the result in that decision and may also indicate that the legislature rejects the elements test as an appropriate guide in the area of homicide offenses. The amendments express the legislature's judgment that there can be other lesser included offenses of murder besides manslaughter,[189] and this indicates the legislature's rejection of those decisions that narrowly construed the scope of lesser included offenses of murder. Although limited to homicide crimes, the amendments may signal more generally that the test does not promote the legislative intent behind its codification of lesser included offenses.

C. The Constitutional Origins of the Elements Test: The Blockburger *Rule*

1. Double Jeopardy Clause

The origins of the elements test do not provide a strong recommendation for its adoption as the measure of lesser included offenses. The test was first adopted by the United States Supreme Court in *Blockburger v. United States*;[190] and it is frequently referred to as the *Blockburger* test. The federal courts applied the *Blockburger* test as the standard for determining when related crimes form part of the same offense so that the Constitution prohibits a state from imposing separate punishments. The *Blockburger* test establishes that offenses are the "same offense" for purposes of double jeopardy analysis unless "each provision requires proof of a fact which the other does not."[191]

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[188] Friley v. State, 879 So. 2d 1031 (Miss. 2004). The supreme court rested its conclusion that unlawful touching was a lesser included offense of sexual battery upon factual inferences that it determined were reasonable based on evidence unique to the case. *Id.* This limits the prospective utility of the opinion as authority in future cases. This Article proposes that the courts should adopt the broader rationale of the dissenting justices on the court of appeals.

[189] MISS. CODE ANN. § 97-3-19(3) (Supp. 2004) ("[A murder] indictment may include any and all lesser included offenses thereof, including, *but not limited to, manslaughter*.") (emphasis added). The contemporaneous amendment of the provision regulating indictments may have a more limited effect. MISS. CODE ANN. § 99-7-37 (2000 & Supp. 2004) (providing murder and capital murder indictments "shall be sufficient to also charge the lesser offense of manslaughter without a specific allegation of such lesser crime and without any necessity for an additional count charging such lesser crime.").

[190] 284 U.S. 299 (1932).

In construing the constitutional limits on states, the United States Supreme Court meant to establish a weak rule that interfered as little as possible with the operation of the state criminal process. Indeed, the Court later abandoned the *Blockburger* test as a legal bar on multiple punishments, and it now applies the elements test as only a guide to legislative intent regarding punishment.[192]

The United States Supreme Court later adopted the *Blockburger* test as the legal limit on multiple prosecutions under the Double Jeopardy Clause, so states may not separately prosecute defendants for crimes that meet the elements test.[193] Although the Court has repeatedly opined that the

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[191] *Blockburger*, 284 U.S. at 304.

[192] Absent other evidence, the Court presumes the legislature means to avoid multiple punishment for lesser included offenses that meet the elements test. Missouri v. Hunter, 459 U.S. 359, 366 (1983) (holding that expressed legislative intent controls whether cumulative punishments should be imposed and observing "the Double Jeopardy Clause does no more than prevent the sentencing court from proscribing greater punishment than the legislature intended."); Albernaz v. United States, 450 U.S. 333, 340 (1981) (stating that *Blockburger* test "serves as a means of discerning congressional purpose [and] should not be controlling where, for example, there is a clear indication of contrary legislative intent.").

Some dictum suggests that the Double Jeopardy clause should indeed be given the same scope in both the cumulative punishment and successive prosecution contexts. United States v. Dixon, 509 U.S. 688, 704 (1993) (Scalia, J.) (suggesting that "same offense" language of Double Jeopardy Clause should be given same meaning in different contexts). *See generally* 4 LAFAVE, *supra* note 33, at 653. *See generally* FRIEDLAND, *supra* note 103, at 198-99 (discussing fact that "[m]any courts and writers have recognized that the rule [preventing cumulative punishment] is of far less significance than rules against successive prosecutions" but acknowledging that courts have nevertheless often confused the cases). The problem of state circumvention of double jeopardy under the elements analysis was addressed by Justice Souter in *Dixon*, 509 U.S. at 688 (Souter, J., dissenting). *See generally* LAFAVE, *supra* note 33, at 653.

[193] "[T]he Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." Harris v. Oklahoma, 433 U.S. 682, 682 (1977); *see*

Blockburger test dictates consideration of elements in the abstract, in a case where an offense could be proven by alternative elements, the Court itself considered the elements that applied to a particular conviction. In *Harris v. Oklahoma*,[194] the Court held that a felony murder conviction resulting from a killing during the commission of robbery barred a subsequent robbery prosecution despite the fact that the elements of robbery were not necessarily included in every felony murder.[195]

In applying the *Blockburger* elements test, the Court does not look beyond the legal definition of the offense to consider the pleadings or evidence.[196] But the Court's own fractured opinions applying the formal test indicate the difficulties in applying the test even as so restricted.[197]

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also Grady v. Corbin, 495 U.S. 508, 516 (1990) (referring to lesser included offenses in *Blockburger-Brown* analysis by stating that "[i]f. . .offenses have identical statutory elements or. . .one is a lesser included offense of the other, then. . .subsequent prosecution is barred."), *overruled on other grounds*, United States v. Dixon, 509 U.S. 688 (1993). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 32.07 at 718 (3d ed. 2002) (discussing cases); LAFAVE, *supra* note 33, at 647-49 (1999).

[194] 433 U.S. 682 (1977).

[195] Murder obviously required proof of the additional fact of homicide. Moreover, felony murder could be committed in a variety of ways other than by robbery.

[196] *Dixon*, 509 U.S. at 690 (1993); *see generally* DRESSLER, *supra* note 193, § 32.07 at 718; LAFAVE, *supra* note 33, § 17.4(b) at 647-49.

[197] Justice Scalia concluded that one defendant's prosecution for cocaine possession was barred by his previous conviction for criminal contempt (where the contempt conviction was itself based on a finding that the defendant committed the same crime of cocaine possession). *Dixon*, 509 U.S. at 695. He concluded that another defendant's conviction of assault was barred by his previous prosecution for contempt (where the contempt proceeding was based on acts that included the assault). *Id.* at 697-700 (Scalia and Kennedy, JJ.). But only Justice Kennedy agreed with this analysis.

In applying *Blockburger*, three other members of the Court concluded that none of the prosecutions were barred, *id.* at 713 (Rehnquist, O'Connor, Thomas, JJ., concurring and dissenting in part), and two concluded that all were barred, *id.* at 731-33 (White and Stevens, JJ., concurring and dissenting in part). Much depended on how closely the "elements" of charged offenses were construed. For example, Justice Rehnquist argued that a contempt conviction did not bar a subsequent violation for assault because the order whose violation result in contempt was drawn in such terms that it could have been violated by a simple assault or threat and did not necessarily include the elements of the crimes of assault with intent to kill or threat to inflict bodily harm that the Court found were barred. *Id.* at 719.

Nothing in the Constitution requires states to adopt the *Blockburger* test as the definition of lesser included offenses under state criminal law. On the contrary, the fact that the Constitution might not prevent a state from separately punishing a criminal for murder and assault with intent to injure does not necessarily mean it would be good policy for state criminal law to do so.

Even as a constitutional test, the elements test proved to be controversial[198] While the United States Supreme Court has considerable experience in constitutional matters as well as the undisputed authority as final arbiter of the Constitution, the Court lacks the depth of experience of state courts in administering substantive criminal law.

Dressler notes that the "in view of post-*Dixon* departures from the Court, the role of *Harris* in double jeopardy law remains unstable." DRESSLER, *supra* note 193, § 32.07 at 723.

[198] Most commentators appear to be critical of the *Blockburger* test both as an adequate definition of the same offense for purposes of Double Jeopardy and as a working definition of lesser included offense. *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 872 (4th ed. 2000) ("In many instances, dissecting a crime into such components [under *Blockburger*] is anathema to the values traditionally associated with the protection against double jeopardy."); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1814 (1997) ("Blockburger. . .is a mess, legally and logically"); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 349-58 (2000); Charles William Hendricks, Note, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 380 (2000); Angela Henson, Note, *Now You Have It, Now You Don't: The Sixth Amendment Right to Counsel after* Texas v. Cobb, 51 CATH. U.L. REV. 1359, 1387 n.221, 1387 n.222 (2002) (citing cases and commentary critical of *Blockburger* rule); Michael J. Howe, Note, *Tomorrow's Massiah: Towards a Prosecution Specific' Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 158 (2004) ("The *Blockburger* test has long been criticized as focusing only on the elements of abstract statutory offenses and not the actual criminal conduct at the heart of successive prosecutions."); David McCune, Casenote, United States v. Dixon: *What Does "Same Offense" Really Mean?*, 48 ARK. L. REV. 709, 745 (1995); Kathryn A. Pamenter, Case Comment, United States v. Dixon: *The Supreme Court Returns to the Traditional Standard for Double Jeopardy Analysis*, 69 NOTRE DAME L. REV. 575, 596 (1994); Tat Man J. So, Comment, *Double Jeopardy, Complex Crimes and* Grady v. Corbin, 60 FORDHAM. L. REV. 351, 361 (1991).

2. Sixth Amendment

The United States Supreme Court recently adopted the elements test in another constitutional context where a majority of the Court concluded that it was desirable to restrict the scope of related crimes. The Sixth Amendment establishes the right to legal representation in criminal prosecutions.[199] After the Court held in 1991 that the right attaches to specific offenses,[200] the problem inevitably arose of defining the scope of offenses to which the right attached. In *Texas v. Cobb*,[201] the Court adopted the *Blockburger* elements test.[202]

3. Prohibition of All-or-Nothing Choice in Capital Cases

The United States Supreme Court held in *Beck v. Alabama*[203] that lesser included offense instructions are constitutionally required under certain circumstances.[204] In *Beck*, the defendant was convicted of capital murder for the intentional killing of a robbery victim.[205] Under Alabama law, non-capital felony murder was a lesser included offense, but Alabama criminal procedure prohibited the submission of lesser offense instructions in a capital case.[206] The Supreme Court held that such instructions were required.[207]

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[199] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to. . .have the assistance of counsel for his defence.").

[200] McNeil v. Wisconsin, 501 U.S. 171 (1991).

[201] 532 U.S. 162 (2001).

[202] *Cobb*, 532 U.S. at 173 (holding that where defendant was prosecuted for burglary Sixth Amendment did not prevent interrogation in the absence of counsel regarding a homicide that occurred during the burglary because burglary was not a lesser included offense of capital murder under the elements test). The holding has been criticized. *See* Andrew Hanawalt, Note, *Investigation of Represented Defendants after* Texas v. Cobb, 81 TEX. L. REV. 895 (2003).

[203] 447 U.S. 625 (1980).

[204] *Beck*, 447 U.S. at 638. The court had previously held that lesser included offense instructions were required, when appropriate, in federal criminal cases, but it had reserved the question of whether such instructions were constitutionally mandated. Keeble v. United States, 412 U.S. 205, 213 (1973) (reversing conviction of assault with intent to commit serious bodily injury where facts justified simple assault instructions). The Court emphasized that failure to give appropriate lesser included offense instructions could pressure the jury into returning a false conviction. *Keeble*, 412 U.S. at 212. The exact source of the constitutional requirement is controversial. *See* State v. Bowers, 709 A.2d 1255, 1263 n.6 (Md. 1998); *see generally* Deanna Hall, Note, *The "Third Option": Extending the Lesser Included Offense Doctrine to the Non-Capital Context*, 29 HOFSTRA L. REV. 1333, 1340-50 (2001). However, it is closely tied to both due process and Eighth Amendment interests that states must protect.

The Court expressed concern that the omission of such instructions would present the jury with the all-or-nothing choice of either convicting or acquitting.[208] Faced with a serious crime, the Court believed that many juries would convict even when the evidence failed to prove all the elements of the greater offense.[209] The Court identified five sources for its conclusion that such instructions were constitutionally required: 1) common law juries could convict for any lesser offense necessarily included in the charge; 2) Alabama's failure to provide lesser included offense instructions in capital cases was a deviation from widespread practice and was unique; 3) such instructions were required in federal cases; 4) other states universally required such instructions when supported by evidence;[210] and 5) such instructions were available, even in Alabama, in all cases except for capital offenses.[211]

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[205] *Beck*, 447 U.S. at 627.

[206] *Id.* at 628.

[207] *Id.* at 638.

[208] *Id.* at 626.

[209] *Id.* at 637.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Id. From the Court's reasoning, it follows that it would never be necessary to give all available lesser included offense instructions under *Beck*. *See also* Schad v. Arizona, 501 U.S. 624 (1991) (holding omission of theft instruction in felony murder prosecution was not error where court also instructed on non-capital second degree murder, finding that the second degree murder instruction permitted conviction of a non-capital offense that reduced the risk of error).

For a general critique of permitting juries to make such all-or-nothing choices, even when desired by trial counsel, see Patrick D. Pflaum, Comment, *Justice Is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-Or-Nothing Doctrine*, 73 U. COLO. L. REV. 289 (2002). *Cf.* State v. Taylor, 794 A.2d 246 (N.J. Super. Ct. App. Div. 2002) (holding that trial court should give lesser included offense instructions even when contrary to defense trial strategy), *cert. denied*, 803 A.2d 1162 (2002). One of the issues on review in *Howell v. State*, 860 So. 2d 704 (Miss. 2003), *cert. granted*, 124 S. Ct. 2908 (2004), is whether omission of instructions is error in the absence of a request or objection.

The Court in *Beck* assumed that the elements test would readily determine whether an offense was a lesser included offense.[212] It necessarily rejected the argument that state characterization controlled because felony murder was not a lesser included offense under state procedures to the extent that Alabama law prevented the submission of felony murder instructions in capital cases.[213]

In later cases, the Court has limited the scope of the *Beck* rule[214] and clarified that the Constitution neither requires a state to create a lesser included offense to capital crimes nor requires a state to instruct on lesser crimes that do not meet the elements test.[215] Moreover, it has held that such instructions are only required in cases where evidence supports the lesser included offense instructions.[216]

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[210] Many states require such instruction to avoid the all-or-nothing problem discussed in *Beck*. States disagree, however, as to whether such instructions are required when not requested. *See generally* Catherine L. Carpenter, *The All-Or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 262 (1999) (discussing authority and proposing that lesser included offense instruction should be required even where parties fail to request).

[211] *Beck*, 447 U.S. at 633-37.

[212] *Id.* at 627-28.

[213] *Id.*

[214] *See* Spaziano v. Florida, 469 U.S. 447 (1984) (holding trial court need not instruct on lesser included offense time-barred by statute of limitations unless defendant waives defense under statute of limitations). *See generally* Hall, *supra* note 204, at 1343-45.

[215] Hopkins v. Reeves, 524 U.S. 88, 90-91 (1998) (holding state court not required to instruct on offenses that are not lesser included offenses under state law and finding that second degree murder requiring intent was not lesser included offense of felony murder). Where there were no lesser included offenses to felony murder, defendant was not constitutionally entitled to any. *Hopkins*, 524 U.S. at 99.

[216] This is the issue raised in *Howell v. State*, 860 So. 2d 704, 744 (Miss. 2003) (affirming capital murder conviction despite failure to instruct on simple murder because "the facts of this case clearly do not support or warrant such instructions."), *cert. granted*, 124 S. Ct. 2908 (2004).

Although commentators have urged the extension of the *Beck* rule to non-capital cases,[217] and the Third Circuit has so extended the rule,[218] the Supreme Court limited the holding in *Beck* to capital offenses, emphasizing the unique risks of error presented in such cases.[219] The Fifth Circuit has refused to apply it to non capital prosecutions.[220]

D. Other Jurisdictions

1. Federal courts

The federal statute defining lesser included offenses was replaced in 1944 by Rule 31 of the Federal Rules of Criminal Procedure which retained the language that a defendant "may be found guilty of any offense necessarily included in the offense charged."[221] In applying this rule, federal circuits faced challenges similar to those confronted by state courts, and federal courts adopted divergent definitions of lesser included offenses. Some circuits adopted the inherent relationship test, which, like the pleadings and evidence approaches of state courts, looked beyond the formal elements of the offenses. Others employed the elements test.[222] In *Schmuck v. United Staes*,[223] the Supreme Court resolved the split around the federal courts and adopted the elements test that it had applied in constitutional contexts as the criterion for lesser included offenses in federal criminal prosecutions.[224]

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[217] *See* Hall, *supra* note 204, at 1333 n.14; Michael H. Hoffheimer, Note, *Habeas Corpus Review of State Trial Court Failure to Give Lesser Included Offense Instructions*, 16 U. MICH. J.L. REF. 618-19 n.4 (1983); *see also* Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 438, 458 (2004) (criticizing the Court's failure to apply more generally the substantive rules it has elaborated in death penalty cases, but not specifically discussing *Beck*).

[218] Vuyosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988) (holding constitution required lesser included offense instruction in non-capital case).

[219] *Beck*, 447 U.S. at 637.

> Even for capital cases, the scope and implications of the *Beck* decision are unclear. It is not clear, for example, whether a capital defendant is constitutionally entitled to instructions for only one noncapital [lesser included offense], or for the most rational [lesser included offense] in view of the defense theory, or for all [such instructions] warranted by the evidence.

Shellenberger & Strazzella, *supra* note 59, at 17. The Court has subsequently made clear that an instruction which reduces the risk of the all-or-nothing choice satisfies the constitutional requirement of *Beck*. Schad v. Arizona, 501 U.S. 624 (1991) (holding in first degree felony murder case that *Beck* did not require instruction on lesser included offense of theft where jury was instructed on second degree murder).

[220] *See* Vallens v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988) ("In a non-capital murder case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue."). *See generally* Shellenberger and Strazzella, *supra* note 59, at 43-44 (summarizing authority from federal circuits to effect that only Third Circuit has applied *Beck* rule in non capital context).

[221] FED. R. CRIM P. 31(c). *See generally* Walter W. Jones, Jr., Annotation, *What Constitutes Lesser Offenses "Necessarily Included" in Offense Charged Under Rule*

2. States

Although the elements test was once a minority approach among state courts,[225] more states have adopted the elements test, and today a majority of states apply the elements test as their definition of lesser included offenses as a matter of state criminal law.[226] Nevertheless, a significant minority adheres

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31(c) of Federal Rules of Criminal Procedure, 11 A.L.R. FED. 173 (1972) (2003).

[222] *See* Schmuck v. United States, 489 U.S. 705, 710 n.5 (1989) (discussing division among circuits). One commentator identified three separate approaches among federal circuits. Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 197-208 (1984). These three approaches paralleled the elements, pleading, and evidence approaches of state courts. *Id.*

[223] *Schmuck*, 489 U.S. at 721-22 (holding defendant prosecuted for mail fraud not entitled to instruction on odometer tampering because latter offense contained element not contained in former).

[224] *Id.* at 716 (holding lesser included offense must include some but not all of the elements of the greater offense and must not require proof of any element that the greater offense does not). In adopting this test, the court cited constitutional authority and deliberately chose a universal definition that would apply in all practice settings. *Id.* at 718 (citing Beck v. Alabama, 447 U.S. 625 (1980)).

[225] In 1972, Barnett claimed that the majority of states employed the pleading approach. Jerrold H. Barnett, *The Lesser Included Offense Doctrine: A Present Day Analysis for Practitioners*, 5 CONN. L. REV. 255, 291 (1972).

[226] *See* State v. Kinkade, 709 P.2d 884 (Ariz. 1985) (citing State v. Celaya, 660 P.2d 849, 852 (Ariz. 1983)); State v. Thompson, 34 S.W.3d 33 (Ark. 2000); Meads v. People, 78 P.3d 290 (Colo. 2003); People v. Skinner, 825 P.2d 1045 (Colo. App. 1991); Lilly v. State, 649 A.2d 1055, 1061 (Del. 1994); State v. Willis, 673 A.2d 1233, 1238 (Del. Super. 1995); Scott v. State, 453 So. 2d 798 (Fla. 1984); People v. Bowens, 718 N.E.2d 602, 610 (Ill. 1999); Moore v. State, 691 N.E.2d 1232, 1236 (Ind. App. 1998); State v. Rodriguez, 636 N.W.2d 234, 247 (Iowa 2001); State v. Clubb, 62 P.3d 667, 669 (Kan. 2003); State v. Bowers, 709 A.2d 1255,

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1260 (Md. 1998), *followed by* Harris v. State, 728 A.2d 180, 188 (Md. App. 1999); People v. Cornell, 646 N.W.2d 127 (Mich. 2002), *followed by* People v. Mendoza, 664 N.W.2d 685 (Mich. 2003); Peiffer v. State, 88 S.W.3d 439, 443 (Mo. 2002); State v. Smith, 678 N.W.2d 733, 736 (Neb. 2004); Barton v. State, 30 P.3d 1103, 1108 (Nev. 2001); *In re* Nathan L., 776 A.2d 1277 (N.H. 2001); State v. Varela, 993 P.2d 1280, 1286 (N.M. 1999); State v. Pouncy, No. COA03-407, 2004 N.C. App. LEXIS 469, *6 (2004), *cert. denied*, 599 S.E.2d 916 (N.C. 2004); State v. Tyler, 553 N.E.2d 576, 592 (Ohio 1990); Shrum v. State, 991 P.2d 1032, 1035 (Okla. Crim. App. 1999); State v. Giroux, 676 N.W.2d 139, 141 (S.D. 2004); State v. Burns, 6 S.W.3d 453 (Tenn. 1999); State v. Carruther, 993 P.2d 869, 872 (Utah 1999); State v. Corliss, 721 A.2d 438, 442 (Vt. 1998); State v. Berlin, 947 P.2d 700, 702 (Wash. 1996) (citing State v. Workman, 584 P.2d 382 (Wash. 1978); State v. Muentner, 406 N.W.2d 415, 420 (Wis. 1987); Dean v. State, 77 P.3d 692, 697 (Wyo. 2003); *see also* Mungo v. United States, 772 A.2d 240, 244 (D.C. Ct. App. 2001).

Some states have adopted language from Rule 31 of the Federal Rules of Criminal Procedure. *E.g.*, Alaska R. Crim. P. 31(c), R.I. Super. Ct. R. Crim. P. 31(c); Tenn. R. Crim. P. 31(c); Wyo. R. Crim. P. 31(c). This need not signal a decision to embrace the elements test. As explained above, the federal language itself derived from older state statutes and predated the elements test. *See supra* note 106-10. *But cf.* Barton v. State, 10 P.3d 1103, 1108 (Nev. 2001) (reasoning from similarity of language in state rule to Federal Rule 31 that *Schmuck* construction should apply).

At least one state adopted the elements test under a different name. *See* Tim Dallas Tucker, State v. Black*: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 41 S.D.L. Rev. 465, 495 (1996) ("The 'legal factual' test [then employed in South Dakota] is not merely similar to the elements test—it is the same test.").

Tennessee adopted the elements test, expanded it, and restored it—all in cases construing a state rule modeled on Federal Rule 31. State v. Burns, 6 S.W.3d 453, 465 n.7 (Tenn. 1999) (overruling State v. Trusty, 919 S.W.2d 305 (Tenn. 1996), and expanding lesser included offenses to lesser grade offenses with different elements). It has resisted the extension of the elements test to manslaughter. *Burns*, 6 S.W.3d at 465 n.7. *Burns* explains that part of *Trusty*'s motivation was the desire to avoid finding that manslaughter was not a lesser included offense of murder; *see also* State v. Rush, 50 S.W.3d 424, 428 (Tenn. 2001) (discussing state's effort to expand test to related offenses and its reduction of test to elements test).

Today, Tennessee adopts what it calls a modified Model Penal Code approach. *Rush*, 50 S.W.3d at 428. This comprises the elements test plus offenses that have a lower level of culpability, as well as offenses consisting of preparatory conduct. Under this approach, the court has concluded that voluntary manslaughter and reckless homicide are lesser included offenses of first degree intentional murder. State v. Sims, 45 S.W.3d 1, 21 (Tenn. 2001).

See generally Walter Dickey, et al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 Wis. L. Rev. 1323, 1393 (discussing Wisconsin's adherence to strict elements test); Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. Puget Sound L. Rev. 185, 190 (1992) (discussing relatively recent authority for elements test adopted by Washington state courts);

to older approaches that do not limit lesser included offenses to those crimes that comprise a subset of elements of a charged offense.[227]

3. Model Penal Code

The Model Penal Code contains a provision that prohibits convictions of more than one offense when "one offense is included in the other."[228] The Code further provides:

Theodore E. Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 LAND & WATER L. REV. 523, 532 n.23 (1998) (discussing adoption of elements test in 1993); Hadassah Reimer, *Stabbed in the Back, But No Adverse Effect*, Mickens v. Taylor, 122 S. Ct. 1237 (2002), 3 WYO. L. REV. 329, 361 n.361 (2003) (discussing Wyoming adoption of elements test in 1989); Kimberly A. Richards, *New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine*, State v. Campos, 28 N.M. L. REV. 535 (1998); William O. Salen, Note, *Critique of Wisconsin's Lesser Included Offense Rule*, 1979 WIS. L. REV. 896 (criticizing elements test). The treatment of lesser included offenses by other jurisdictions will be discussed at length in Hoffheimer, *supra* note *.

[227] *See* T.D.T. v. State, 745 So. 2d 885, 893 (Ala. 1998) (holding that Ala. Code 1975 § 13A-a-9(a)(1) looks to facts in addition to formal elements); Nathaniel v. State, 668 P.2d 851, 854 (Alaska 1983) (holding that Alaska employs "cognate theory" rather than elements test); State v. Cannon, 440 A.2d 927, 931 (Conn. 1981) (applying four-part test that considers whether crime as described in charging instrument would have required commission of lesser offense); State v. Sloane, 544 A.2d 826, 830 (N.J. 1988) (consulting facts of offenses, not elements, and considering structure of criminal code to find some crimes with additional elements as lesser included offenses); Commonwealth v. Buffington, 828 A.2d 1024 (Pa. 2003) (observing that offenses "necessarily included" were broader than those determined to be lesser included under elements test); State v. Yates, 571 A.2d 575 (R.I. 1990) (retaining inherent relationship test).

South Carolina begins with the elements test as its starting point but augments it. State v. Burton, 589 S.E.2d 6, 8 (S.C. 2003) (augmenting elements test by those offenses that were traditionally treated as lesser included offenses even where they fail to meet the elements test). California decisions employ a combination of the accusatory pleading and elements test. *E.g.*, People v. Waidla, 996 P.2d 46, 75 (Cal. 2000); People v. Lopez, 965 P.2d 713, 720 (Cal. 1998)

[228] MODEL PENAL CODE § 1.07(1)(a) (1985). The Code also provides that a conviction of a lesser included offense comprises an acquittal of the more serious charged offense, even when the conviction is later set aside. *Id.* § 1.08(1). This limitation was derived from double jeopardy jurisprudence. Further, the Code gives courts discretion to impose judgment for lesser included offenses in certain cases. *Id.* § 6.12:

> If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may

> A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.[229]

Nine states and one United States territory have adopted statutory definitions of lesser included offenses modeled on the Model Penal Code.[230]

The Code also defines more serious offenses in ways that

> enter judgment of conviction of a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

Id.

[229] *Id.* § 1.07(4). Although the Code represented a high water mark in the rise of a general theory of lesser included offense doctrine, the Code's formula did not exert any appreciable influence on state court decisions construing the definition of lesser included offenses under state law. *See* Commonwealth v. Carter, 393 A.2d 660, 662 (Pa. 1978) (Pomeroy, J., dissenting) (lamenting lack of attention to Model Penal Code). *But see* State v. Burns, 6 S.W.3d 453, 466-7 (Tenn. 1999) (adopting part of Model Penal Code's amplification of elements test when necessary to avoid unfairly disadvantaging presentation of defense).

[230] *See* ALA. CODE § 13A-1-9(a), tit. 11,(4) (2004); COLO. REV. STAT. § 18-1-408 (2003); DEL. CODE ANN. § 206(b)(3) (2004); GA. CODE ANN. § 16-1-6(2) (2002); IND. CODE ANN. § 35-41-1-16(3) (Michie 2004); KY. REV. STAT. ANN. § 505.020(c) (Michie 2004); MONT. CODE ANN. § 46-1-202(c) (2003); N.J. STAT. § 2C:1-8(d)(3) (West 2004); TEX. CODE CRIM. P. ANN. art. 37.09(3) (Vernon 2003); GUAM CODE ANN. § 105.58(b)(3) (2003); *see also* State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999) (adopting modified elements test influenced by Model Penal Code's definition of lesser included offenses); *see also* 1 MODEL PENAL CODE AND COMMENTARIES § 1.07 cmt. 1, at 106 n.12 (1985) (official draft and revised comments) (identifying seventeen states with recent statutes, rules or proposed statutes or rules barring convictions of greater and lesser included offenses). Although the state of Washington did not adopt the Code's definition of lesser included offenses, it applied its definitions of culpable mental states borrowed from the Code to conclude that manslaughter was a lesser included offense of murder. State v. Jones, 628 P.2d 472, 475 (Wash. 1981).

often contain definitions of less serious offenses. This is especially clear in the careful phraseology employed in defining culpability levels. The more blameworthy levels normally, if not necessarily, incorporate less blameworthy ones.[231] In addition, the Code expressly provides that lower culpability levels are established by proof of higher ones.[232]

The drafters did not see anything controversial in the Code's treatment of lesser included offenses and understood it to be consistent with prevailing practice.[233] The Code's provisions did not, however, indicate what test to apply in determining whether crimes were lesser included offenses. Its general definition of lesser included offense as a crime "established by proof of the same or less than all the facts required to establish the commission of the offense charged" embraced the ambiguity in mid twentieth century federal and state rules.[234] For example, in a case where, a defendant is prosecuted for murder on the theory that the defendant purposely fired a gun at the victim's head, the Code's language might mean that the crime of simple assault (i.e., negligently injuring with a weapon[235]) is not a lesser included offense. Because the Code definition of murder does not require discharge of a weapon, proof of discharging a weapon is not "required to establish the commission of the offense."[236] But the Code's language might equally support the conclusion that the simple assault was a lesser included offense in the particular case where, under the prosecution's theory of the case, discharge of a weapon would in fact be "required to establish the commission of the offense."[237]

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[231] *See* MODEL PENAL CODE § 2.02(2)(a)-(d) (1985). The Code's four culpability levels are purposely, knowingly, recklessly and negligently. *Id.* Under most circumstances, the definitions make proof of a higher culpability level sufficient to prove the lower. Acting purposely requires a conscious object, which would be established by acting knowingly, which would in turn be established by acting recklessly, which requires an awareness of risk, which would in turn be established by acting negligently, which requires the taking of a risk of which one "should be aware" (whether or not one is).

[232] *Id.* § 2.02(5).

> When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Id. The drafters provide the obvious explanation:

> Subsection (5) makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was *more* culpable than the definition of the offense requires. Thus, if the crime can be committed recklessly, it is no less committed if the actor acted purposely.

Id. § 2.02 explanatory note.

[233] *Id.* § 1.07 explanatory note.

[234] *Id.*

In other words the Model Penal Code does not provide a test for deciding what crimes are lesser included offenses. As late as 1985, the Code's commentators failed to appreciate the divergence of tests for lesser included offenses, though they paraphrased the Code's rule in a fashion that suggests its convergence with the elements test.[238]

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[235] *Id.* § 1.07(4)(a). The problem might be presented by a section of the Code that defines simple assault as negligently causing bodily injury with a deadly weapon, MODEL PENAL CODE § 211.1(1)(b), as a lesser included offense.

[236] *Id.*

[237] *Id.* Further ambiguities are not resolved by the Code. Thus, it is uncertain whether the offenses are determined by reference to the particular elements that the prosecution must prove or to alternative elements in the statute.

For example, the Code defines simple assault as negligently causing bodily injury with a deadly weapon. *Id.* § 211.1(1)(b). This form of simple assault is not necessarily committed in the commission of murder under the Code. But simple assault, elsewhere defined as purposely, knowingly or recklessly causing bodily injury, *id.* § 211.1(1)(a), would necessarily be committed when a defendant commits murder in any manner under the Code (assuming death is bodily injury). *Cf.* MODEL PENAL CODE § 210.2 (defining murder as criminal homicide committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life).

[238] The commentary to section 1.07 was based on research that ended in 1979. 1 MODEL PENAL CODE AND COMMENTARIES § 1.07, cmt. 104 (1985) (official draft and revised comments). Though observing that "jurisdictions differ on how they define 'included offense,'" *id.* at 129, the commentary did not suggest that the Code offered authority for any particular approach. It then paraphrased the Code's rule: "Under this [Model Penal Code] approach, a lesser offense is included in a greater if all the statutory elements of the lesser are also elements of the greater . . . . Although courts have defined 'included offense' in different ways, the definition set forth in Paragraph (a) is the most widely used." *Id.* at 130 (citing Barnett, *supra* note 225, at 291). The fact that the Model Penal Code definition is subject to competing interpretations is amply proved by the fact that the scholarly article that the Code commentary cites for the proposition that the Code definition comported with the majority actually placed the Code in the mi-

E. Problems with the Elements Test

1. Policy-based Objections to Elements Test

Need for prosecutorial flexibility. At first glance, the elements test would seem to favor prosecutors. It provides the least protection to defendants against multiple trial and punishment for closely related offenses.[239] Such considerations probably motivated the Supreme Court to adopt the elements test as the definition of "same offense" under the Double Jeopardy Clause, and they may also have encouraged some jurisdictions to adopt the elements test as the definition of lesser included offenses under their substantive criminal law.

Nevertheless, a restrictive definition of lesser included offenses is a serious handicap to prosecutors at the trial court level who seek to modify a charge in an indictment. This handicap is particularly heavy in Mississippi where the state constitution prevents substantive modification of an indictment without returning to the grand jury.[240] Problems for prosecutors are aggravated by limitations on resources available to prepare cases for trial and by the delays attendant on grand jury practice in rural counties. The reality facing prosecutors in Mississippi is that they have one opportunity to secure an appropriate conviction against a wrongdoer, and they must do so under circumstances where they often discover weaknesses in their cases only as they proceed to trial.

In a routine case where the prosecutor's evidence indicates deliberate design murder, the defense may produce evidence

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nority. *Id.* at 291.

The confusion over the Model Penal Code is also evidenced by Friedland's association of the Code's formula with the *Blockburger* rule, on the one hand, and his confusion of the *Blockburger* rule with the pleadings test on the other. FRIEDLAND, *supra* note 103, at 109 & 109 n.3.

[239] The elements test has been criticized for underprotecting defendants from successive prosecution in the double jeopardy context. *E.g.*, Amar, *supra* note 198, at 1818-19.

[240] MISS. CONST. art. III, § 27. *See supra* note 48. Cases adopt different standards for determining whether an amendment is substantive. *See* Quick v. State, 569 So. 2d 1197, 1199 (Miss. 1990); Burrell v. State, 727 So. 2d 761, 765 (Miss. App. 1998).

previously unavailable to the prosecution that indicates provocation that could negate a finding of "malice" and mitigate liability to manslaughter. For this reason, manslaughter has always been a lesser included offense of murder, and it was the district attorney who appealed the trial court decision in *Shaw* and urged the supreme court to restore manslaughter as a lesser included offense of murder.[241] Similarly, a prosecutor may discover weaknesses in proving the completion of a crime, and, for this reason, the Mississippi statute permits a conviction of attempt to commit a crime on an indictment to commit the crime, even though Mississippi cases may impose different or additional evidentiary requirements for criminal attempts that prevent them from satisfying the elements test.[242]

Prosecutors may discover similar weaknesses of proof on the charge in an indictment that may undermine the case for the greater charge yet not exonerate the defendant from liability for lesser included offenses. Although the federal and state constitution require adequate notice of charges in order to permit a defendant to prepare for trial,[243] a defendant is not unfairly surprised when the charge is modified to embrace behavior against which he or she was prepared to defend, certainly not when the charge is modified to embrace wrongful conduct for which the defendant has provided the evidence. For example, where a defendant has been charged with murder in a case where the defendant is on notice that the prosecution's theory is that the killing resulted from the discharge of a firearm, the defendant is not unfairly disadvantaged if, due to weaknesses that emerge with respect to the evidence of cause of death, the prosecutor seeks to submit a charge of aggravated assault either as an alternative or substitute for murder.[244] Although a restrictive application of the elements test might conceivably support a conclusion that aggravated assault is not a lesser included offense, a more flexible approach would readily find that aggravated assault in such a case is a lesser included offense.

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[241] State v. Shaw, 880 So. 2d 296 (Miss. 2004).

[242] There is some confusion as to the appropriate standard as evidenced by the decision in *Dambrell v. State*, 2002-KA-01260-COA (Miss. Ct. App. 2004), *cert. granted*, 883 So. 2d 1180 (Miss. 2004). In this case the defendant entered a store with the intent to commit robbery and bearing a knife wrapped in a towel. *Id.* ¶ 4. He fled the store without completing the robbery and was charged and convicted of attempted robbery by use of a weapon. *Id.* ¶ 5. The majority of the court of appeals held that the conviction should be reversed because the language of the indictment committed the prosecutor to proving an attempt to steal by means of displaying a weapon. *Id.* ¶ 15. The majority found that the trial record failed to support a finding that the defendant displayed a deadly weapon. *Id.* Judges Griffis and Southwick disagreed and found that the record supported a finding of display of the weapon. *Id.* ¶ 17 (Griffis and Southwick, JJ., dissenting). It is unclear to this author why, if the conviction is erroneous solely because the record was devoid of evidence of display of a weapon, the court of appeals did not direct entry of judgment of attempted robbery or attempted larceny rather than reversing and rendering. Perhaps the court was persuaded by the record that the defendant effectively abandoned the attempt but was unable to decide the case on that basis because of the state of the record.

[243] U.S. CONST. amend. XIV; MISS. CONST. art. III, §§ 26-27.

Lack of fit with Mississippi statutes. The elements test is singularly inappropriate in Mississippi where criminal statutes have been gradually adopted for well over a century and have never been systematically revised. One need not agree with a recent article that concludes that Mississippi has the single worst criminal code in the United States[245] to appreciate that many of the state's criminal provisions are defined in ways that generally prevent offenses from satisfying the elements test for closely related more serious offenses.

The reasons for this have nothing to do with the purposes served by the doctrine of lesser included offenses. First, the state code still retains the practice begun in the 1830s of defining related offenses (like murder and manslaughter or grand and petty larceny) in alternative terms even when the legislation plainly intended to rank such offenses as lesser included offenses.[246]

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[244] MISS. CODE ANN. § 97-3-7(2) (2000) (defining aggravated assault as attempting to cause serious bodily injury, causing such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to value of human life, attempting to cause or purposely or knowingly causing bodily injury with deadly weapon or means likely to produce death or serious bodily harm).

[245] Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60-61 (2000) (ranking Mississippi's criminal code in fifty-second place due to structural incoherence and lack of systematic approach to sentencing classifications).

[246] See *supra* notes 123-27 and accompanying text. *See, e.g.*, MISS. CODE ANN. § 97-17-41 (2000) (defining grand larceny as theft of property of value of $500 "or

Second, the code contains many case-specific offenses designed to fill gaps. These crimes often impose specific additional requirements that prevent them from qualifying as lesser included offenses under the elements test. For example, manslaughter resulting from wilfully or negligently overloading a boat[247] would escape being classified as a lesser included offense of murder under the elements test. Similarly, aggravated DUI would escape being classified as a lesser included offense of manslaughter. While the recent amendments of the homicide statutes permit a more flexible approach to murder and manslaughter, the application of the elements test will still produce undesirable and even comical results in other parts of the code. Larceny by stealing milk from a cow[248] would not be a lesser included offense of grand larceny.

Third, the Mississippi code and case law define the culpability components of different crimes in ways that prevent their ready comparison. Under the code language from the 1830s, murder may be proven where the killer acted with a "depraved heart regardless of human life," and manslaughter requires "culpable negligence." Such "culpable negligence" was later defined by cases as requiring proof of "utter indifference to the safety of human life."[249] The language describing the culpable mental states for both murder and manslaughter differs still more from that employed to define aggravated assault because the assault statute was copied from the Model Penal Code, which requires proof that the actor acted "recklessly under circumstances manifesting extreme indifference to the value of human life."[250]

Some serious crimes, because the conduct is itself mani-

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more"); MISS. CODE ANN. § 97-17-43 (2000) (defining petit larceny as theft of property "under" value of $500).

There are numerous examples of this kind of alternative or exclusive definition of crimes in the code. For example, the crime of poisoning is defined to include administering poison with intent to kill "whereof death shall not ensue." MISS. CODE ANN. § 97-3-63 (2000).

[247] MISS. CODE ANN. § 97-3-41 (2000).

[248] MISS. CODE ANN. § 97-17-55 (2000).

[249] *See* Hoffheimer, *supra* note 85, at 111, 124-25.

[250] MISS. CODE ANN. § 97-3-7(2) (Supp. 2004) (copying and modifying MODEL PENAL CODE § 211.1).

festly blameworthy and goal-oriented, may require only general intent, while less serious harms of the same general sort may require proof of specific intent. Such is the case with rape and unlawful touching of a child.[251] A restrictive application of the elements test to such offenses would always find some additional or different element that supported the conclusion that the less serious crime was not a lesser included offense. But such a conclusion would neither promote a coherent construction of the criminal code nor advance the policies served by the doctrine of lesser included offenses.

2. Formal indeterminacy of the elements test

The great selling point of the elements test was its promise to simplify the work of judges and promote the uniform administration of legal rules. Federal courts advertised such advantages when they adopted the elements test,[252] and this encouraged states to follow suit.[253]

Truth in advertising should require a warning that the mechanical ease of application ascribed to the test has proven illusory.[254] Chief Justice Rehnquist likened the determination of lesser included offenses to "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[255] More recently, Justice Breyer considered the Chief Justice's characterization overly charitable:

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[251] *See supra* notes 183-88.

[252] Schmuck v. United States, 489 U.S. 705, 720-21 (1989) (stating that elements test was preferable to inherent relationship test because analysis of statutory element rather than trial evidence promoted greater certainty and predictability).

[253] *See, e.g.*, State v. Wright, 622 N.W.2d 676, 680 (Neb. 2001) (quoting State v. Al-Zubaidy, 570 N.W.2d 713, 716 (Neb. 1997) (identifying certainty and uniformity of elements test described as reasons for adoption by state)). Justice Cavanagh argues that the majority of the Supreme Court of Michigan adopted the elements test because of its ease of application. People v. Mendoza, 664 N.W.2d 685 (Mich. 2003) (Cavanagh and Kelly, concurring) ("Foremost among the majority's rationale may be the alleged ease with which the necessarily included lesser offense framework may be applied.").

The Mississippi Supreme Court explicitly rejected the persuasiveness of the federal judiciary's employment of the elements test in *Mayfield v. State*, 612 So. 2d 1120, 1125 (Miss. 1992) ("This Court, therefore, is not bound by the *Schmuck* ruling [adopting elements test in federal criminal trials].").

Other states have been influenced by the federal courts' adoption of the elements test as authority for adopting it. *See* State v. Keffer, 860 P.2d 1118, 1133 (Wyo. 1993); *Wright*, 622 N.W.2d at 680; Hagans v. State, 559 A.2d 792, 801-02 (Md. 1989) (citing *Schmuck* as authority in adopting elements test); *see also* Huigens, *supra* note 226, at 202-04.

[254] At least one commentator observed this. Lauer, *supra* note 226, at 532

> Some [courts] will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . [w]here Armies whole have sunk."[256]

There are three kinds of formal problems with the application of the elements test that help explain its failure to achieve simplicity. First, the test assumes that elements of crimes are easily identified. In fact, there is often remarkable uncertainty over the meaning of elements, and the elements test actually *creates* uncertainties that did not previously exist. For example, it was generally clear in Mississippi that a defendant bore the burden of raising the issue of provocation to mitigate murder to voluntary manslaughter. It was also clear that the record had to contain some evidence supporting a finding of provocation in order to justify submission of a manslaughter charge. But the elements test forced the state courts to decide whether these evidentiary burdens in manslaughter had the cumulative effect of creating an additional element for manslaughter that prevented it from being a lesser included offense.[257]

("While the [elements] test may seem simple enough, and be capable of almost mechanical application, in practice it has proved more difficult."). Thomas observes that "*Blockburger* is driven. . .by its mechanical nature, rather than common sense," GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 176 (1998), and criticizes the results of its application to offenses with different elements where the elements have no bearing on the blameworthiness of the conduct. *Id.* at 102 ("Though *Blockburger* is mostly hard-edged, it fails to deliver a set of results consistent with double jeopardy policies.").

[255] Albernaz v. United States, 450 U.S. 333, 343 (1981). *See generally* David D. Velloney, *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, ARMY LAW., April 2002, at 41, 58 (observing that "[t]he cases and multiplicity law in general have led commentators to liken the 'multiplicity conundrum' to the 'Gordian Knot,' the Sargasso Sea, and being damned to the inner circle of the Inferno to endlessly debate it.").

[256] Texas v. Cobb, 532 U.S. 162, 185 (2001) (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting) (quoting JOHN MILTON, PARADISE LOST, II, 592).

[257] Justice Robertson championed the view that the treatment of manslaughter

Many criminal statutes predate the modern idea of elements, and others have been drafted without clearly indicating elements. Accordingly, the identification of elements under the elements test requires courts to find legislative intent in contexts where the legislature generally had no intent. The test requires courts to find something in offenses that is not there until courts look for it.[258] It is clear from the experience of other jurisdictions with the elements test that rather than applying to preexisting "elements," the elements test itself encourages courts to reconstruct elements to fit the test.[259]

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as lesser included offense of murder is formally irreconcilable with elements test. *See* Hailey v. State, 537 So. 2d 411, 419 (Miss. 1988) (Robertson, J., concurring); *see also* Grayer v. State, 519 So. 2d 438, 440 (Miss. 1988) (Robertson, J.); Isom v. State, 481 So. 2d 820, 824-25 (Miss. 1985) (Robertson, J., concurring).

[258] Whether manslaughter is a lesser included offense of murder hangs on the illusory distinction between whether "without malice" is an element or merely evidence of blameworthy neglect that establishes the requisite "without malice." *See infra* note 259, discussing Michigan's experience. *Cf.* State v. Short, 618 A.2d 316, 321 (N.J. 1993) ("Although manslaughter may be at common law a lesser offense than murder, at common law it has always been a separate crime from murder because of the absence of malice."). *Compare* United State v. Browner, 889 F.2d 549, 552 (5th Cir. 1989) (observing that statutory definition of voluntary manslaughter readily establishes it as lesser included offense of murder but finding that it is lesser included offense based on "common-law background" which reveals that provocation and passion negate malice, the defining element of murder) *and* Jefferies v. State, 849 So. 2d 401, 404 (Ct. App. Fla. 2003) (holding felony battery was lesser included offense of voluntary manslaughter but not of manslaughter by culpable negligence because intent mental element of battery was inconsistent with negligence mental element of manslaughter).

[259] Michigan's experience is instructive. The state has a statute modeled on the 1829 New York one, *see supra* note 105 (quoting New York model), providing that lesser included offenses are inferior offenses or lesser degrees of the same offense. MICH. COMP. LAWS § 768.32 (2000). The Michigan courts long construed this broadly and applied an evidence test to define lesser included offenses. In 2002, the state supreme court, unaware of the history of the statute, reinterpreted its plain meaning to require the elements test. *See* People v. Cornell, 646 N.W.2d 127 (Mich. 2002). This presented the state court with a dilemma because it had held previously that manslaughter was not a lesser included offense under the elements test. People v. Van Wyck, 262 N.W.2d 638 (Mich. 1978), *overruled by* People v. Mendoza, 646 N.W.2d 685 (Mich. 2003). Undaunted, the court reconsidered the elements of homicide offenses, insisting that manslaughter was simply murder minus malice, *Mendoza*, 664 N.W.2d at 689, and that provocation, while necessary evidence, did not comprise an "element" of voluntary manslaughter. *Id.* at 690. This allowed the court to find that manslaughter met the elements test yet to preserve state law under which a killing with provocation was not in fact committed during a killing with malice. *Id.* The practical legal consequences of

Second, even when the elements are clearly designated, many statutes prescribe alternative methods of committing a crime. For example, capital murder contains a list of different circumstances under which murder is elevated to capital murder[260] as well as circumstances under which killings, not necessarily murder, are defined as capital murder.[261] Forcible rape and statutory rape reside in the same statute.[262] Various different acts satisfy the "sexual penetration" element for sexual battery.[263] Even a single element like "dangerous weapon" can usually be satisfied in a variety of ways. All of these instances raise the problem of how to apply the elements test to compound crimes.

The Supreme Court faced a very simple form of the compound crime problem in *Harris v. Oklahoma*,[264] where a defendant was convicted both of felony murder and robbery.[265] The felony murder statute required proof of homicide caused during the commission of a number of felonies, including robbery.[266] Because other listed felonies would also satisfy the felony element, no single felony would ever satisfy a formal elements test for a lesser included offense that required that it be impossible to commit the charged offense without simultaneously committing the lesser included offense. Nevertheless, the Court held that the robbery was a lesser included offense of felony murder.[267] Though this result makes sense, commentators have had difficulty reconciling it with the elements test because it would be possible, looking just at elements in the

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the court's clever recharacterization of elements are uncertain.

[260] *E.g.*, MISS. CODE ANN. § 97-3-19(2)(a)&(h) (Supp. 2004) (defining capital murder as murder of certain victims); § 97-3-19(2)(b) & (c) (defining capital murder as murder by certain defendants); § 97-3-19(2)(g) (defining capital murder as murder in certain places); § 97-3-19(2)(c) (defining capital murder as murder by certain methods).

[261] *Id.* § 97-3-19(2)(e) & (f) (killings by defendants engaged in listed felonies or in attempt to commit such felonies defined as capital murder).

[262] MISS. CODE ANN. § 97-3-65(1)-(4) (Supp. 2004).

[263] MISS. CODE ANN. § 97-3-97(a) (2000) (defining sexual penetration by four specific acts as well as by inclusive catchall definition).

[264] 433 U.S. 682 (1977).

[265] *Harris*, 433 U.S. at 682.

[266] *Id.* at 682-83.

[267] *Id.* at 686.

abstract, to commit the more serious crime (i.e., murder) without committing the less serious crime (i.e., robbery).[268]

The Supreme Court has recently attempted to apply the elements test to multiple prosecutions for both criminal contempt and a crime whose commission provided the evidence for the contempt.[269] The Court could produce no analysis supported by a majority and published fractured opinions, demonstrating the Court's own uncertainty as to the application of the elements test in live cases.

Third, it is uncertain how the elements test can or should be applied to qualitatively different culpable mental states.[270] For example, it is uncertain whether the general intent mental state required for rape differs from the specific intent mental state required for unlawful touching in such a way that it could be considered to include the specific mental intent. Courts have reached surprising conclusions, finding, for example, that evidence of extreme recklessness negates a claim of criminal negligence.[271]

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[268] Commentators observe that this holding is incompatible with formal application of the elements test because the crime of felony murder could have been committed without the commission of the robbery. *See* DRESSLER, *supra* note 193, at 719.

[269] United States v. Dixon, 509 U.S. 688 (1993); *see supra* notes 196-97 discussing case.

[270] This problem has been apparent in judicial decisions for some time. *See, e.g.*, State v. Sloane, 544 A.2d 826, 829 (N.J. 1988) (observing that under statutory definition of lesser included offenses modeled after Model Penal Code "none of the categories would literally indicate that passion-provocation manslaughter is a lesser-included offense of murder; this is because both offenses require the same mental state (knowledge and purpose) and the same degree of injury (death).").

The difficulty of applying the elements test frustrates the alleged simplicity of the test. *See* People v. Mendoza, 664 N.W.2d 685, 697 (Mich. 2003) (Cavanagh and Kelly, JJ. concurring) ("I cannot agree that the [elements test] can be applied more simply than [an alternative cognate offense test] because each varies on the basis of the degree of specificity with which one reviews the elements of a crime."). This problem is illustrated by the experience in Michigan, *see supra* note 259, as well as by the vacillation of Justice McRae in his treatment of manslaughter as a lesser included offense of murder under Mississippi statutes.

[271] Sanders v. State, 781 So. 2d. 114, 120 (Miss. 2001); *see supra* note 85.

IV. PROPOSALS FOR MISSISSIPPI

A. General Approach

The legislature has acted twice to provide guidance with respect to overlapping offenses. In 1857, it codified the common law doctrine of lesser included offenses.[272] In 2004, after Justice McRae applied the elements test to reach the unprecedented conclusion that manslaughter was not a lesser included offense of murder, the legislature acted to restore manslaughter and other crimes as lesser included offenses of murder.

This action signals that the legislature wants courts to continue to elaborate the concrete contents of the doctrine of lesser included offenses. The judicial approach that has worked best has been case-by-case decisionmaking that avoids universal theories. The approach that has led to the most unsatisfactory results, requiring legislative correction, is the approach driven by the elements test theory.

This article proposes that courts supplement the elements approach by a flexible consideration of whether the crime, as charged in the particular case, could be committed without also committing the lesser included charge. This would result in an expansion of crimes that would qualify as lesser included offenses.

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[272] *See supra* note 135. The recent negative judgment of the Mississippi Criminal Code was based in part on the legally incorrect observation that the code failed to offer "any guidance regarding how to deal with overlapping offenses." Robinson et al., *supra* note 245, at 36. The authors specifically listed the captions of Mississippi homicide statutes and contrasted the absence of any guidance to those states that enacted provisions based on the Model Penal Code. Robinson et al., *supra* note 245, at 37. This is a double error. First, Mississippi (like other states ranked at the bottom) has a statute that codifies and even expands the doctrine of lesser included offenses. Second, the Model Penal Code provision cited offers little additional guidance beyond its equally ambiguous codification of lesser included offenses. MODEL PENAL CODE § 1.07(a) (1985). To be specific, the Code adds the rule that prevents multiple convictions of a simple conspiracy and the completed crime that is its object, *id.* § 1.07(b) (which most jurisdictions reject as a matter of substantive law), the prohibition of convictions based on inconsistent facts, *id.* § 1.07(c) (which is presumably required under case law), the prohibition of multiple convictions for crimes that "differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct," *id.* § 1.07(d), and the prohibition of multiple convictions for separate parts of continuing wrongful conduct "unless the law provides that specific periods of such conduct constitute separate offenses," *id.* § 1.07(e).

The expansion of lesser included offenses would benefit the prosecution. The restriction of lesser included offenses under the elements test prevents prosecutors from adding appropriate charges, but it does not similarly prevent defendants from requesting jury instructions for the reason that Mississippi law entitles defendants to instructions on "lesser related offenses" necessary to present the defense theory even if they are not lesser included offenses.[273] Defendants would benefit collaterally from a broader definition of lesser included offenses because it would prevent the prosecution from sequentially prosecuting.

The proposed general rule. In deciding what offenses are "necessarily included" in crimes charged in indictments, this Article proposes retaining the current standard that asks whether it would be possible for the accused to have committed the greater offense without committing the lesser offense. In applying this standard, this article proposes that courts should not focus abstractly on the elements. Rather, courts should ask whether it would be possible to commit the greater offense without committing the lesser offense under the prosecution's theory of the case of which the defendant has fair notice.

The test should not be whether it would be theoretically possible to commit the greater offense without committing the lesser one in any possible situation. Rather, the test should be whether it would be possible to commit the charged offense without committing the uncharged lesser offense in the case before the court.

Specific additional rules.

First, the general rule retains the elements test. Lesser included offenses would include but not be limited to crimes that satisfy the elements test.

Second, consistent with the original purposes of the 1839 and 1857 codification of the doctrine of lesser included offenses, lesser included offenses should include those offenses that were universally recognized as lesser included offenses at common law as well as inferior offenses of the same degree. For example, larceny is a lesser included offense of robbery, and fourth degree arson is a lesser included offense of arson.[274]

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[273] *See supra* note 50, discussing the law of lesser related offenses in Mississippi.

Third, lesser included offenses should also include those crimes that must be proven in order to establish a conviction of another more serious crime. For example, robbery is a lesser included offense of capital murder when proof of capital murder requires proof of robbery;[275] DUI first offense is a lesser included offense of DUI second offense;[276] and, a crime proven in order to prove criminal contempt is a lesser included offense of criminal contempt.[277]

Fourth, lesser included offenses should apply to gap-filling offenses that are specific instances of more generally defined wrongful conduct prohibited by more serious offenses. For example, larceny by stealing a dog[278] should be a lesser included offense of both grand and petit larceny.[279]

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[274] MISS. CODE ANN. §§ 97-17-1 to 97-17-9 (2000) (defining arson crimes in four degrees).

[275] MISS. CODE ANN. § 97-3-19(2)(e) (2000 & Supp. 2004) (defining capital murder as killing "by any person engaged in commission of" certain crimes including robbery); *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977) (holding double jeopardy prevented multiple conviction for felony murder and predicate felony).

[276] *Ostrander v. State*, 803 So. 2d 1172 (Miss. 2002) (affirming conviction of first-time DUI in a case where defendant indicted for DUI second offense).

[277] *E.g.*, United States v. Dixon, 509 U.S. 688 (1993).

[278] MISS. CODE ANN. § 97-17-51 (2000). This would presumably not be a lesser included offense under the elements test since the state must prove the additional element for the lesser offense that the property of another is a dog.

[279] This proposed rule is not specifically set forth as part of the Model Penal Code's definition of lesser included offenses, MODEL PENAL CODE § 1.07(4), but it is set forth as a limit on multiple convictions under the Code. MODEL PENAL CODE § 1.07(1)(d) (1985) ("[A defendant] may not . . . be convicted of more than one offense if . . . the offenses differ only in that one is defined to prohibit a designated king of conduct generally and the other to prohibit a specific instance of such conduct . . . .").

DeWitt T. Allred, III, has expressed misgivings about the proposed fourth sub-rule. Letter from DeWitt T. Allread, III, Assistant District Attorney for Hinds county, to the author (Aug. 10, 2004) (on file with author). Mr. Allred regards the subject matter jurisdiction of trial courts as limited by the language of an indictment. *Id.* According to him, the court's jurisdiction extends to crimes properly charged and crimes necessarily encompassed by the charge. *Id.* On this view, the specific crime of theft of a dog would not be necessarily covered by an indictment for the more general crime of theft of personal property above a certain value.

These proposed rules are consistent with the vast majority of holdings and dicta from the supreme court. The general rule differs from the elements test only by permitting additional consideration of the concrete course of wrongful conduct. It would preclude hyper-technical arguments that prevent a crime from being found to be a lesser included offense. It would protect the defendant's legitimate interest in avoiding surprise by looking at whether the indictment, in context, apprised the defendant of the prospect of trial on the lesser included offense.

Because the question of notice is fact specific, appellate courts should defer to a trial court's finding of sufficient notice. In many cases, it will be clear from the trial record that the defendant received notice. For example, the record may disclose that the prosecutor's theory was that the defendant caused death with a firearm. In such a case, an aggravated assault should be a lesser included offense of murder. The prosecutor would be entitled to such a charge. If the prosecutor does not request it, the defendant would be entitled to insist that the charge could not be raised in later proceedings.

In other cases, the trial record may not be clear. In such cases, it is useful to distinguish between a trial where the prosecutor requests a lesser included offense instruction and one where the prosecutor does not. Where the prosecutor requests the instruction, the trial court should give it, provided that the defendant received fair notice. The trial court's decision to give the lesser included offense instruction should be presumed to be proper. This presumption would place the burden on a defendant resisting lesser included offense charges to show lack of fair notice. While courts will have to decide what comprises fair notice in some hard cases, an absence of notice that prejudices the ability to prepare a defense obviously establishes lack of fair notice.

Nevertheless, the proposed sub-rule is compatible with the view that the courts' criminal jurisdiction is fixed by the state constitution and statutes. *See* Jefferson v. State, 556 So. 2d 1016, 1021, (Miss. 1989) (Robertson, J.) (holding that defendant's right to avoid prosecution for uncharged offense not qualifying as lesser included offense is personal not jurisdictional); *see also* State v. Yoreck, 133 S.W.3d 606, 611-12 (Tenn. 2004) (holding trial court had jurisdiction to enter judgment on plea to uncharged offense).

The practical consequence of the proposed rule would be to place the burden on a defendant to establish a record that enlarges the preclusive effect of a prior prosecution beyond the elements test. If no lesser included offense instruction was requested by the prosecutor at the prior trial, a defendant who later seeks to bar a successive prosecution of an uncharged offense must show either that the offense is a lesser included offense under the elements test[280] or that the record at the first trial provided fair notice that under the prosecution's theory it would not have been possible to commit the charged offense without committing the uncharged one. To obtain a greater preclusive effect than one would obtain under the elements test, the defendant would bear the burden of establishing in the trial record that he or she was at risk of conviction for those crimes that do not satisfy the elements test.

B. Applications

This Article proposes that courts should employ a more flexible approach that encourages a case by case determination of whether uncharged crimes are lesser included offenses. This approach would permit courts to find that numerous crimes are lesser included offenses even when they do not meet the elements test. Homicide crimes and sexual assaults provide examples of the benefits of the proposed approach.

1. Homicide

The recent amendments, consistent with case law prior to *Shaw*, establish that murder is a lesser included offense of capital murder and that all forms of manslaughter are lesser included offenses of murder.[281] The amendments also indicate that "other" crimes may be lesser included offenses of murder.

Under the rule proposed in this Article, Mississippi courts should find that aggravated DUI is a lesser included offense of capital murder and murder when a defendant is provided fair notice that the state's theory of the greater offense commits it to proving the elements of DUI. Likewise, courts would be authorized to find that manslaughter is a lesser included offense of aggravated DUI in those cases where the defendant is provided fair notice that the prosecution's theory commits it, in proving the elements of aggravated DUI, to proving culpable negligence.[282]

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[280] This limit is constitutionally imposed. *See supra* notes 191-96 and accompanying text.

[281] MISS. CODE ANN. § 97-3-19(3) (Supp. 2004).

This Article also proposes that aggravated assault and simple assault should be lesser included offenses of any crime in which the defendant is provided fair notice that the prosecution's theory necessarily requires proof of conduct that comprises the elements of aggravated assault or simple assault. Such notice will always be present where the indictment charges deliberate design murder, and it will usually be present where an indictment charges voluntary manslaughter.[283] Moreover, the 2004 amendments strongly suggest the legislature's intention to correct those older decisions that hold that simple assault is not a lesser included offense of murder.[284]

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[282] Such findings would not be possible under the elements test; neither would the elements test support the older decisional rule that aggravated DUI was a lesser included offense of manslaughter. *See supra* note 2. That older decisions would still be proper under the rule proposed in this article if aggravated DUI was a less serious offense than manslaughter.

[283] In Mississippi, proof of voluntary manslaughter necessarily requires a simple assault. Because the killing can either be done in a "cruel or unusual manner, or by the use of a dangerous weapon," MISS. CODE ANN. § 97-3-35 (2000), voluntary manslaughter will also require proof of an aggravated assault where the theory is that the defendant used a dangerous weapon. *See id.* § 97-3-7(2) (defining aggravated assault as attempt to cause or to purposely or knowingly causing bodily injury with deadly weapon or other means likely to produce death).

[284] *See supra* notes 180-82. The amendments specifically provide that "[a]n indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include *any and all lesser included offenses thereof*, including, but *not limited to*, manslaughter." MISS. CODE ANN. § 97-3-19(3) (Supp. 2004) (emphasis added). The legislature clearly envisaged that murder could include lesser included offenses other than manslaughter. And, though the amendments do not speak to the offenses included in a charge of manslaughter, the purpose of the legislature would similarly support the conclusion that assault is a lesser included offense of manslaughter.

2. Rape and sexual assaults

The Mississippi Code's treatment of various forms of sexual assault presents special challenges. Despite their common name and location in the same section of the code, statutory rape[285] and forcible rape[286] share only one element (i.e., sexual intercourse) which is also an element of numerous other crimes.[287]

Accordingly, statutory rape should not be a lesser included offense of forcible rape either under the elements test or under the flexible approach advocated by this Article.[288] Nor is forcible rape a lesser included offense of statutory rape.[289]

In contrast, the code defines two different forms of statutory rape, and the less serious forms might be considered lesser included offenses of the more serious ones. For example, a defendant might be indicted for statutory rape in violation of subsection 97-3-65(1) (b). This subsection requires proof that the victim was under fourteen and twenty-four months younger than the rapist.[290] A factual dispute about the time of the act might raise a question about the age of the victim, yet the evidence might still support a conviction under section 97-3-65(1)(a). Under subsection (a) the victim must be either fourteen or fifteen and thirty-six months younger than the rapist.[291]

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[285] MISS. CODE ANN. § 97-3-65(1) (Supp. 2004).

[286] MISS. CODE ANN. § 97-3-65(4) (Supp. 2004).

[287] Prior to the amendment of the rape statute, forcible rape required proof of lack of consent, and it would have been possible to argue that the age elements of statutory rape also proved lack of consent as a matter of law. But, as it currently stands, forcible rape does not require proof of lack of consent as an element. Accordingly, the behavior criminalized by forcible rape and statutory rape are significantly different. In an appropriate case, the prosecutor should be careful to charge both forms of rape, though their location in a common statute presumably indicates the legislature's decision that only one punishment should be imposed.

[288] The supreme court has identified most of the reasons for this in concluding that unlawful touching of a child (fondling) is not a lesser included offense of forcible rape. Hailey v. State, 537 So. 2d 411, 412-17 (Miss. 1988).

[289] Forcible rape would not be a lesser offense in any event because of the sentencing ranges for violators.

[290] MISS. CODE ANN. § 97-3-65(1)(b) (Supp. 2004).

[291] *Id.* § 97-3-65(1)(a)(i)-(iii). A subsection-(a) violation by a defendant under

The elements approach, would prevent rape of a fifteen-year-old from being a lesser included offense of rape of a child under age fourteen. Because the statute defines the age requirements in exclusive rather than inclusive terms, the less serious offense requires proof of something different from the more serious one. This Article proposes, however, that rape of a fifteen year old should be a lesser included offense of rape of a victim under age fourteen. Both forms of statutory rape fall under the common statutory requirements of sexual intercourse by a defendant seventeen or older "with a child."[292]

Courts would also be justified in finding that sexual battery is a lesser included offense of forcible rape.[293] The element of sexual intercourse is included within the broader definition of sexual penetration under sexual battery.[294] The age elements for statutory rape track the age elements for sexual battery. A restrictive application of the elements test would falter at the fact that the crimes of forcible rape and sexual battery do not overlap in theory because the former requires the element of force and not consent, and the latter requires the element of lack of consent and not force. But, in reality, there is no force if there is consent, so proving force necessarily requires proving lack of consent.

The Mississippi courts have grappled repeatedly with the issue of whether the crime of unlawful touching of a child (i.e, fondling)[295] is a lesser included offense of statutory rape. Applying the elements test, a majority of the court of appeals concluded that unlawful touching was not a lesser included offense because the age requirement could be different and because the crime of unlawful touching required proof of specific intent to

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twenty-one is a lesser offense: punishment is up to five years imprisonment as opposed to twenty for a subsection-(b) violation. MISS. CODE ANN. § 97-3-65(3)(a)-(b) (Supp. 2004).

[292] MISS. CODE ANN. § 97-3-65(1)(a) (Supp. 2004).

[293] There would be no need to find that sexual battery of a child would not be lesser included offenses of statutory rape for the reason that they prescribe the same punishment. *See id.* §§ 97-3-65(3) (Supp. 2004) & 97-3-101(2)-(3) (2000).

[294] *Id.* § 97-3-97 (2000) (defining "sexual penetration" in way that necessarily includes sexual intercourse defined in MISS. CODE ANN. § 97-3-65(5)).

[295] The crime's elements are a defendant eighteen or older who, with the purpose of gratifying lust, touches a victim younger than sixteen. *Id.* § 97-5-23.

gratify lust.[296] The flexible test proposed by this Article supports the view of the supreme court and the dissenting judges on the court of appeals who concluded that, given the legal construction of the general intent required for rape, it would be impossible to commit the crime of statutory rape without also touching for purpose of gratifying lust. Accordingly, in a case where a charge of statutory rape puts the defendant on fair notice that the accusation with respect to the age elements will also support a conviction for unlawful touching, unlawful touching should be considered a lesser included offense of statutory rape. For the same reasons, unlawful touching should be treated as a lesser included offense of sexual battery of a child.

A final question is whether assault is a lesser included offense of either rape, sexual battery or unlawful touching of a child. At first glance, under the elements approach, simple assault might seem to be a lesser included offense of the crimes of rape, sexual battery and unlawful touching because the unwanted sexual contact (i.e., predatory sexual contact with a minor) necessarily involves a bodily injury.[297] A problem arises from the definition of "bodily injury." Under the Model Penal Code, from which the Mississippi assault statute is taken, bodily injury requires "physical pain, illness or any impairment of physical condition."[298] However, this definition was not enacted in Mississippi, and, under some case law, aggressive restraint and offensive touching comprises bodily injury.[299] The obstacle to finding assault a lesser included offense under the elements test is that, even under Mississippi cases, the victim must apparently fear some serious injury or perceive some offensive contact to establish injury for simple assault. This is theoretically unnecessary for rape, sexual battery or unlawful touching where the victim may be unconscious. This Article proposes that, whether or not simple assault satisfies the elements test, simple assault should in appropriate cases be a lesser included offense of rape, sexual battery and unlawful touching of a child. This result is consistent with case law holding that simple assault is a lesser included offense of attempted rape.[300]

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[296] *See* Friley v. State, 856 So. 2d 654 (Miss. Ct. App. 2003), *rev'd*, 879 So. 2d 1031 (Miss. 2004), discussed *supra* at notes 171-88 and accompanying text.

[297] MISS. CODE ANN. § 97-3-7(1) (2000 & Supp. 2004) (defining simple assault as attempting to cause or to purposely, knowingly or recklessly causing bodily injury). § 97-3-7(1)(a).

[298] MODEL PENAL CODE § 210.0(2).

[299] *See* Griffith v. City of Bay St. Louis, 797 So. 2d 1037, 1042 (Miss. Ct. App. 2001) (holding that grabbing of wrist in aggressive manner was sufficient evidence of simple assault). *But see* S.B. v. State, 566 So. 2d 1276, 1279 (Miss. 1990) (holding juvenile's touching and squeezing of pregnant woman's buttocks did not constitute simple assault where defendant was prosecuted under theory of placing victim in fear of imminent serious bodily harm).

Under the elements approach, aggravated assault,[301] requiring serious bodily injury or use of a deadly weapon, would not be a lesser included offense of rape, sexual battery or unlawful touching. But under the more flexible approach urged in this Article, courts would be authorized to find that aggravated assault is a lesser included offense when the defendant is placed on fair notice in a rape or sexual battery case that the alleged conduct also satisfies the serious bodily injury element of the lesser offense.

3. Other Crimes and the Rule of Common Sense

This Article does not offer a cure-all. The approach it proposes invites Mississippi courts to work toward the gradual construction of principles of lesser included offenses on a case-by-case basis that promotes overall coherence in the law. For example, its proposal permits, but does not require, the result of previous decisions holding that the less serious crimes of possession and possession with intent to sell contraband were lesser included offenses of the more serious crime of selling contraband.[302] Those results should not be permissible under the elements test.

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[300] Armstead v. State, 503 So. 2d 281, 285-86 (Miss. 1987). In *Grayer v. State*, 519 So. 2d 438 (Miss. 1988), the court upheld a defendant's conviction of assault with intent to ravish on an indictment for forcible rape. *Grayer*, 519 So. 2d at 440. The court dismissed the argument that assault with intent to rape required an additional element (chaste character of the victim) by comparing this additional requirement to the heat of passion required for manslaughter. *Id.* at 440 n.3.

[301] MISS. CODE ANN. § 97-3-7(2) (Supp. 2004) (defining aggravated assault as attempting to cause or purposely or knowing causing serious bodily injury or doing so recklessly under circumstances manifesting extreme indifference to value of human life, and attempting to cause or purposely or knowingly causing bodily injury by deadly weapon or other means likely to produce death or serious bodily harm). The Model Penal Code defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." MODEL PENAL CODE § 210.0(3) (1985). This definition has not been adopted in Mississippi. *See* Bridges v. State, 790 So. 2d 239 (Miss. Ct. App. 2001) (holding blow with mop handle inflicting pain accompanied by threats of more serious injury constituted sufficient evidence of aggravated assault).

This Article proposes common sense results. Unlawful possession of explosives[303] and possession of burglary tools[304] should be lesser included offenses of the crime of burglary with explosives[305] even though they might escape being found to be lesser included offenses under a clever application of the elements test.

4. Evidence Sufficient to Affirm Convictions of Lesser Included Offenses

There is currently some uncertainty about what appellate courts should do in cases where a jury has returned a verdict of guilty on a lesser included offense where the record does not contain evidence necessary to prove elements of the lesser offense but contains sufficient evidence to support a conviction of the greater offense. The possibility of such appeals would be increased by any approach that supplements the elements test.

Such counter-factual verdicts typically result from jury compromises.[306] For example, in *Arthur v. State*,[307] the defendant was charged with capital murder on the theory that he participated in a robbery that caused the death of the victim.[308] The jury acquitted the defendant of capital murder but convicted of robbery despite the fact that no lesser included offense charge was submitted.[309]

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[302] *See supra* notes 174-75.

[303] MISS. CODE ANN. § 97-37-23 (2000).

[304] MISS. CODE ANN. § 97-17-35 (2000).

[305] MISS. CODE ANN. § 97-17-37 (2000).

[306] For an example of an improperly coerced compromise, see *Isom v. State*, 481 So. 2d 820 (Miss. 1985).

[307] Arthur v. State, 735 So. 2d 213 (Miss. 1999).

[308] *Arthur*, 735 So. 2d at 213-14.

[309] *Id.*

The supreme court reversed because the record did not disclose the ground supporting the robbery conviction.[310] The majority of the court reasoned that there were two possibilities: either the jury concluded that the defendant participated in the robbery during which the victim died, or the jury believed that the defendant stole the property from the corpse.[311] According to the majority, a verdict based on the defendant's participation in the robbery would be inconsistent with its acquittal of capital murder[312] while robbery from a corpse would be legally impossible.[313] Because it was not clear what theory the jury employed, the court remanded for retrial.[314]

The approach of the majority in *Arthur* indicated the court's effort to evaluate evidence supporting the guilty verdict on the lesser included offense. This approach is questionable where the verdict results from compromises that actually benefit a defendant. Justice Banks, concurring, adopted an alternative approach that would generally affirm convictions of lesser included offenses when there is sufficient evidence to support a conviction of the greater offense.[315]

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[310] *Id.* at 218.

[311] *Id.*

[312] The majority does not explain why a finding of robbery would be inconsistent with a failure to find the necessary causal connection or concurrence with the homicide.

[313] Justice Banks pointed out that the majority overlooked the fact that the authority supporting convictions of robbery from a corpse required evidence that the intent to rob preceded the death, and such intent should not be imputed from a third party. In other words, according to his concurrence, this theory of robbery, too, would be incompatible with an acquittal of capital murder based on robbery. *Arthur*, 735 So. 2d at 220 (Banks, J., concurring).

[314] A similar concern with avoiding inconsistent or illogical convictions of lesser included offenses motivated Justice Robertson's concurring opinion in *Isom v. State*, 481 So. 2d 824-25 (Miss. 1985) (Robertson, J., concurring) (arguing that jurors persuaded of guilt on murder would not necessarily be persuaded on manslaughter because manslaughter required proof of additional facts to establish heat of passion).

[315] *Arthur*, 735 So. 2d at 220 (Banks, J., concurring) ("This Court has held many times that the fact that the evidence supports the greater offense gives no grounds for reversal of a conviction of a lesser offense, even where an instruction on the lesser offense would not have been authorized by the evidence.") (citing Grace v. State, 379 So. 2d 540, 542-43 (Miss. 1980)). *Cf.* Walker v. State, 86 So. 337 (Miss. 1920) (holding conviction for manslaughter is not reversible error where the defendant was indicted for murder and the evidence was sufficient for

Justice Banks's approach would preserve appropriate convictions based on compromise verdicts where a jury refuses to convict of the greater offense, either due to uncertainty over the additional elements or due to merciful reluctance to convict. Jury nullification of the greater offense hardly entitles the defendant to a windfall nullification on lesser included offenses. This article proposes that Mississippi courts should reevaluate the approach adopted in the *Arthur* case and consider adopting Justice Banks's alternative rule.

V. CONCLUSION

The 2004 legislative amendments restore manslaughter as a lesser included offense of murder and capital murder.[316] These amendments are good policy, are constitutional and should be given broad application to achieve the purpose of the legislation.

The amendments together with the substituted decision in *State v. Shaw* ameliorate the most harmful consequences of the Mississippi Supreme Court's overapplication of the elements test to lesser included offenses in the context of homicide crimes. Nevertheless, the supreme court should eliminate remaining sources of confusion by rejecting the elements test as the exclusive definition of lesser included offenses. The court should apply a more flexible test that expands lesser included offenses to include those less serious crimes that are necessarily committed in the course of committing a charged offense under the prosecution's theory of the case of which the defendant has fair notice.

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the greater crime even in absence of evidence necessary for lesser offense). This comports with the approach of most other jurisdictions in their treatment of homicide offenses. *See generally* Milton Roberts, Annotation, *Propriety of Manslaughter Conviction in Prosection for Murder, Absent Proof of Necessary Elements of Manslaughter*, 19 A.L.R. 4TH 861 (1983) (Supp. 2004) (citing many Mississippi cases affirming both involuntary and voluntary manslaughter where trial record contained sufficient evidence of murder).

[316] MISS. CODE ANN. § 97-3-19(3) (Supp. 2004); *id.* § 99-7-37(2) (2000); *id.* § 99-19-5(2) (Supp. 2004).

COMMENT

SALVATION LIES WITHIN: WHY THE MISSISSIPPI SUPREME COURT CAN AND SHOULD STEP IN TO SOLVE MISSISSIPPI'S INDIGENT DEFENSE CRISIS

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1]

INTRODUCTION

Scott Parker is paying an extra forty dollars a year in county property taxes to cover the legal fees of the two men who killed his family.[2]

On February 3, 1990, residents of Quitman County, Mississippi were stunned by news of a heinous quadruple homicide in the small town of Walnut.[3] Quitman County (the County) is a poverty-stricken rural community with a population of just over 10,000 people.[4] In 1999, the County's per capita income was less than $11,000, yet the County's budget deficit now exceeds two million dollars.[5] The two indigent men accused of the murders were tried and convicted in Quitman County, at a cost of more than $250,000.[6] Because Mississippi has a county-based public defender system, the County was required to provide counsel to the two defendants at its own expense.[7] In order to fund these trials, the county was forced to borrow $150,000, necessitating an increase in taxes paid by its residents.[8] While residents of the County, including the victim's family, were forced to foot the bill for defense costs, the State of Mississippi did not contribute a single dime.

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[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956). In *Griffin*, the United States Supreme Court held that states are required to provide a free trial transcript to any indigent defendant appealing his conviction on non-federal grounds. *Griffin*, 351 U.S. at 19. In 1974, the Court extended *Griffin* to require the appointment of counsel for an indigent defendant's initial appeal from his criminal conviction. Douglas v. California, 372 U.S. 353 (1963). Justice Douglas, writing for the Court, used the Fourteenth Amendment's Equal Protection Clause as the basis for his opinion, finding that California's failure to appoint counsel to indigent defendants for their first appeal drew an "unconstitutional line" between rich and poor. *Douglas*, 372 U.S. at 357.

[2] Sid Salter, *Poor Justice?*, CLARION-LEDGER (Jackson, Miss.), June 8, 2003, at 1G.

The United States Supreme Court decided *Gideon v. Wainwright*[9] in 1963, holding that the Sixth Amendment requires the states to provide counsel for indigent defendants.[10]

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[3] Douglas McCollam, Gideon*'s Promise: 40 Years After the Landmark Supreme Court Ruling, Arnold & Porter's Pro Bono Lawyers Are Still Fighting for Indigent Criminal Defendants*, LEGAL TIMES, Apr. 28, 2003, at 20. Two men, Robert Simon, Jr. and Anthony Carr, were arrested within twenty-four hours of the murders, and subsequently were indicted on multiple charges, including arson, kidnapping, and murder. *Id.* Both men were residents of Memphis, Tennessee. *Id.*

[4] Quitman County v. State, No. 99-0126, slip op. at 3 (Quitman County Cir. Ct. Nov. 7, 2003) [hereinafter *Quitman II*].

[5] *Quitman II*, No. 99-0126, slip op. at 4.

[6] *Id.*

[7] Brief for Appellant at 3, Quitman County v. State, No. 2003-SA-02658 at 3 (Miss. filed July 19, 2004) [hereinafter Brief for Appellant].

[8] *Id.* The tax rates in Quitman County are higher than those for the surrounding counties, although Quitman County has the smallest tax base among them. *Id.* at 8. The county administrator, Thomas "Butch" Scipper, describing the County's reaction to the tax hike, remarked, "[y]ou can imagine how well that went over." McCollam, *supra* note 3.

[9] 372 U.S. 335 (1963).

[10] *Gideon*, 372 U.S. at 344-45. Justice Black, speaking for the Court in *Gideon*, explained:

> reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to

However, the Constitutional mandate set forth in *Gideon* means little where an indigent defendant's attorney does not or cannot provide her client with an adequate defense. As such, later interpretations of the Sixth Amendment held that *Gideon*'s promise is not fulfilled where a defendant receives ineffective assistance of counsel.[11] The functioning and fairness of the adversary system requires the zealous participation of defense counsel in representing his client.[12] Without effective representation for clients on both sides of a case, there is no such thing as a fair trial, and the legitimacy of

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> hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

Gideon, 372 U.S. at 344. The indigent defendant's right to court-appointed counsel was first set forth by the Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, the Court declared that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell*, 287 U.S. at 68-69. In later decisions, the Supreme Court expanded considerably upon Sixth Amendment jurisprudence. For example, the Court's landmark decision in *Miranda v. Arizona* made defense counsel's presence a mandatory prerequisite to the admission of a defendant's confession made under custodial interrogation. 384 U.S. 436 (1966). In *Coleman v. Alabama*, the Court held that a defendant's right to counsel attaches at the preliminary hearing stage. 399 U.S. 1, 9 (1970). The Court's extension of the right to counsel to nearly every stage of a criminal proceeding increases the demand for criminal defense services. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 478 (1982).

[11] The Court has declared that "[t]here is no right more essential than the right to assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341 (1978); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (declaring that "the right to counsel is the right to the effective assistance of counsel"). The Supreme Court of Mississippi has also recognized that the right to counsel is not satisfied by ineffective representation. Vielee v. State, 653 So. 2d 920, 922 (Miss. 1995). The Sixth Amendment guarantees criminal defendants the right to assistance of counsel "in all criminal prosecutions." U.S. CONST. amend. VI. The right to counsel now extends to almost every stage of a criminal proceeding, from arrest to probation hearings. DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1045, 1047 (4th ed. 2000).

[12] *See* Polk County v. Dodson, 454 U.S. 312, 398 (1981) (asserting that adversarial testing advances public interests in truth and fairness); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (cautioning that where defendant does not receive effective assistance, "a serious risk of injustice infects the trial itself"); Herring v. New York, 422 U.S. 853, 862 (1975) (stressing importance of vigorous advocacy by prosecution and defense attorneys to achievement of legal system's ultimate goal).

criminal convictions is questionable.[13]

Unfortunately, neither *Gideon* nor its progeny suggest what method the states should employ to shoulder the expense and the burden of providing counsel to indigent defendants.[14] As a result, methods for providing indigent defense services vary from state to state, and even county to county.[15] This lack of guidance from the Supreme Court on how the states should fulfill *Gideon*'s promise has also resulted in controversies over whether the costs and responsibilities for indigent representation should be borne by the state or local governments.[16] The result, at least in Mississippi, has been the development of piecemeal, patchwork systems, different for every county, with no standards for representation, no centralized oversight, and no State funding.

Despite the Supreme Court's decisions characterizing the right to effective assistance of counsel as "absolute," "essential," and "fundamental,"[17] history reveals that the Mississippi Legislature is neither willing nor able to design an effective solution to Mississippi's indigent defense crisis, much less enact such a solution.[18] The Mississippi Supreme Court has recognized the problems faced by financially-strapped counties attempting to provide indigent defense services, and has, on more than one occasion, encouraged the Legislature to reconsider the county-based system now in place.[19] The court has also recognized its inherent authority to intervene in traditionally legislative functions where the Legislature fails to act in accordance with its constitutional obligations.[20]

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[13] *See* Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 3 (1999) (asserting that underfunding of indigent defenders fails to fulfill constitutional mandate of effective assistance of counsel, and precludes "just results"); Note, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System:* Kennedy v. Carlson, *544 N.W.2d 1 (Minn. 1996)*, 22 WM. MITCHELL L. REV. 1117, 1118-19 (1996) ("[W]ithout effective assistance of counsel an ideal adversarial criminal justice system cannot exist.").

[14] Normal Lefstein, *In Search of* Gideon's *Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 842 (2004). Subsequent decisions of the United States Supreme Court allude to concerns regarding the cost and availability of adequate representation for indigent defendants. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 59 (1972) (Powell, J., concurring) (expressing doubts regarding state and local government efforts to appropriate necessary funds for indigent defense).

[15] Lefstein, *supra* note 14, at 844.

[16] *Id.* at 843-44.

[17] *See, e.g.*, Glasser v. United State, 315 U.S. 60, 76 (1942); *see also* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 440-41 (1993) (asserting that Sixth Amendment right to counsel promotes "reliability of the criminal process, the availability of other constitutional and procedural protections afforded criminal defendants, and relative equality between the opposing sides of a criminal controversy and among different classes of criminal defendants").

A pending suit brought against the State of Mississippi by Quitman County creates an opportunity for the Mississippi Supreme court to exercise its inherent authority to improve the State's criminal justice system for the sake of indigent defendants, attorneys, and the courts. Because the Legislature has neglected its responsibility to provide an adequate system of public defense in Mississippi, the court must use its inherent authority to secure that which is necessary to maintain the integrity of the judicial branch and to see that indigent defendants are afforded the rights guaranteed them by the state and federal constitutions.

This comment proposes the implementation of a statewide public defender system in Mississippi, led not by the Legislature, but by the courts. While the doctrine of separation of powers limits the power of the judiciary to interfere in the duties of the other branches of government, the judicial branch has the authority to maintain its autonomy. Because fundamental rights are at stake, the courts cannot and should not sit idly by, waiting for the Legislature to enact a solution that will never come. Existing statutory authority is insufficient to fulfill the State's duties under *Gideon*. Further, the courts are uniquely qualified to address the current inadequacies of Mississippi's public defender system, as the ultimate administrators of justice.[21] Although this strategy may not provide a comprehensive solution to the State's indigent defense problems, court-led reform is the quickest and most efficient way to promote systemic change. It may also be Mississippi's only hope.

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[18] *See infra* notes 50-76 and accompanying text.

[19] *See, e.g.*, Mease v. State, 583 So. 2d 1283 (Miss. 1991) (Prather, J., concurring); Wilson v. State, 574 So. 2d 1338 (Miss. 1990).

[20] *See, e.g.*, State v. Quitman County, 807 So. 2d 401 (Miss. 2001) [hereinafter *Quitman I*] ("[T]he courts may act in cases of necessity where the Legislature fails to furnish the essentials required for the operation of an independent and effective court.").

Part I of this comment will discuss the extent of the problems faced by Mississippi counties in the delivery of indigent defense services, and the Legislature's reluctance to address the problems, of which it is plainly aware. Part II will discuss the case currently pending before the Mississippi Supreme Court, brought by Quitman County against the State. Part III will present case law on the court's inherent authority to do what is necessary to secure the effective administration of justice. Finally, Part IV will examine other systemic challenges to indigent defense systems, which provide possible methods for the court-led implementation of a statewide public defender system as the remedy for the State's breach of its Constitutional duties.

I. JUST HOW BAD DO THINGS HAVE TO GET BEFORE THE LEGISLATURE TAKES ACTION?

A. *An Unpopular Cause: Problems Faced by Counsel and Their Indigent Clients*

It is highly unlikely that the citizens of Mississippi would readily support the State's use of taxes to improve representation for indigent criminal defendants. A defendant's constitutional right to effective assistance of counsel will not be championed by the majority. Almost no one wants to see tax dollars go towards funding a defense for a person accused of committing a crime.[22] Perhaps the basis for such opposition is the public's desire to maintain safety and order, or its concern that an effective attorney will be able to secure a not-guilty verdict at trial, allowing guilty defendants to "get away with" the crimes they committed.[23] Due to widespread public distaste for indigent criminals and their attorneys, legislative representatives have no incentive to take steps to reform the current indigent defense system.[24] It is not surprising, then, that the problems faced by indigent defendants and their attorneys in Mississippi go unresolved by the legislative branch.[25]

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[21] Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 299 (2002). The judiciary's duty to supervise justice provides the justification for judicial intervention and court-led reform. *Id.* at 300.

[22] *See* Mounts, *supra* note 10, at 475 (describing an atmosphere in which public defender program must operate as "hostile to its purpose" of affording rep-

A major problem faced by attorneys representing indigent clients is that the resources and funding readily available to the prosecution outmatch that which is available to the defense. Mississippi's county-based public defender system fails to provide attorneys with the tools to fulfill their duties to provide effective assistance by stacking the odds against indigent defendants from the outset.[26] In 2001, the State spent

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resentation to persons accused of committing crime).

[23] *See id.* at 482 ("[G]iven the recent increase in public concern over the perceived rise of violent crime, the role of a defender is particularly unpopular."); *see also* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 391-92 (1995) (asserting that taxpayer reluctance to fund counsel for indigent defendants compromises judicial integrity and results in fundamental unfairness); Rigg, *supra* note 13, at 4 ("An additional and more sinister explanation for the reticence to pay reasonable fees in criminal cases is the belief that by paying more, better attorneys will handle the cases, causing the conviction rate to decrease.").

[24] *See* Mounts, *supra* note 10, at 482. When politicians sense that voters are concerned about crime, they frequently adopt a "get tough on crime" mentality. Rigg, *supra* note 13, at 4. Therefore, politicians often respond by cutting funds for politically unpopular programs, like indigent defense. *Id.* at 3.

[25] *See* Stephen B. Bright, *Counsel for the Poor: the Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994) (expressing doubts about improvement in indigent representation due to unpopularity of accused and "lack of leadership and commitment to fairness of those entrusted with responsibility for the justice system").

[26] The tools necessary to building an adequate defense have been identified in post-conviction cases involving claims of ineffective assistance of counsel. *See, e.g.,* Wiggins v. Smith, 539 U.S. 510 (2003) (establishing investigation of mitigating evidence as being crucial to adequate defense); Bell v. Cone, 535 U.S. 685 (2002) (admonishing counsel's failure to call witnesses and waiver of argument in sentencing phase); *see also* Ake v. Oklahoma, 470 U.S. 68, 77 (1995) (emphasizing

approximately $16.5 million on prosecuting felony cases.[27] These funds provide prosecutors with the necessary tools to effectively handle their workload, including assistants, detectives, and access to medical and scientific professionals.[28] Conversely, statistics show that Mississippi counties spent less than $9 million on indigent defense in 2000, which amounts to a little over half of what the State pays for prosecuting the offenders.[29] The counties are forced to shoulder the rather large administrative and financial burden of providing indigent defense services, even though they may be unable to do so.[30] As a result, it is not at all unusual for a public defender to spend his own money to secure that which is necessary for an adequate defense for an indigent client, but such generosity is not always possible.[31] The prosecution's avail-

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necessity of "access to the raw materials integral to the building of an effective defense).

[27] MISS. LEGISLATIVE BUDGET OFFICE, STATE OF MISSISSIPPI BUDGET FY 2001 (2002).

[28] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (explaining that governments "quite properly spend vast sums of money to establish machinery to try defendants accused of crime"); Bright, *supra* note 25, at 1845 (listing wealth of resources available to prosecutors, including law enforcement agencies, crime laboratory experts and mental health professionals).

[29] NAACP LEGAL DEF. AND EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 24 n. 42 (2003) [hereinafter NAACP]. The $9 million figure was divided by the 2000 census figure for Mississippi, which reported 2,844,658 residents. *Id.* Only one state, North Dakota, spends less than Mississippi on representation for indigent defendants. THE SPANGENBERG GROUP, REPORT FOR THE AMERICAN BAR ASSOCIATION INFORMATION PROGRAM (2000).

[30] MISS. CODE ANN. § 25-32-7 (1979). A staff attorney for the National Association of Criminal Defense Lawyers (NADCL) explains the difficulties faced by counties burdened with the responsibility of indigent defense services: "[c]ounties are usually the most strapped for cash. It's difficult for them to come up with money for any big program, let alone something for indigent defense which is going to be pushed to the bottom of the list." Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of* Gideon*: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 53 (2004).

[31] In *Pruett v. State*, counsel paid $3,250 for an expert witness on behalf of his indigent client, after which the trial court denied his motion for reimbursement for the expert's fee. 574 So. 2d 1342, 1349 n.8 (Miss. 1990) (Anderson, J., dissenting). Further, Justice Anderson noted that the defense attorney in *Pruett* was paid less than the court reporter. *Pruett*, 574 So. 2d at 1350 (Anderson, J., dissenting). Some courts have found systems forcing attorneys to resort to use of

able resources tip the scales in its favor, placing the indigent defendant at a decided disadvantage. Quitman County's chief clerk, Butch Scipper, summed up this discrepancy in terms almost anyone can understand when he said: "[i]n every criminal case, it's like fielding a high school team to play the Green Bay Packers."[32]

When the budget is tight and resources are low, the quality of representation inevitably suffers. Court-appointed attorneys and those who volunteer to represent indigent defendants are quickly frustrated by the limited funding available with which to prepare an adequate defense, coupled with the enormous caseloads typically handled by public defenders.[33] While an attorney may move the court to provide funding for her client's defense, such motions are frequently denied.[34] It is difficult to perceive how even the most experienced attorney can provide her client with effective assistance without funds to conduct an adequate investigation, locate witnesses, procure a psychiatric evaluation, or hire experts.[35]

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their own money to fund a proper defense to constitute a taking of the attorney's property. *See, e.g.*, State *ex rel.* Stephan v. Smith, 747 P.2d 816, 841 (Kan. 1987) (finding indigent defense system to violate Fifth Amendment where attorney was required to use his own funds on behalf of indigent defendant with no reimbursement).

[32] Kevin Johnson, *How Good a Defense Should a Suspect Get?*, USA TODAY, Apr. 29, 2003, at 1A.

[33] *See* Bright, *supra* note 25, at 1843-44 (asserting that inadequate funding of indigent defense is most fundamental reason for poor quality of representation in capital cases); Ethics Symposium, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspectives*, 52 EMORY L.J. 1169, 1169 (2003) (characterizing burdens of defense attorneys in under-funded jurisdictions as "grossly excessive"); *see also* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 663 (1986) ("The aspects of representation that suffer most when the defender is confronted with an excessive caseload are the preparation and investigation of the case, and effective communication between the client and his client.").

[34] *See, e.g.*, Pruett v. State, 574 So. 2d 1342 (Miss. 1990).

[35] *See* McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting) ("[T]he absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense."). In the federal arena, Chief Justice Rehnquist has pressed Congress to increase fees paid to lawyers representing indigents, arguing that "[a]dequate pay for appointed counsel is important to ensure that a defendant's constitutional right to counsel is fulfilled."

The majority of attorneys representing underprivileged defendants in Mississippi have their own private practices to maintain, which detracts from the attorneys' devotion and time to prepare for a trial on behalf of indigent clients. Attorneys representing indigent defendants are burdened with impossible caseloads, forcing them to juggle clients and priorities.[36] As a result, the attorney's representation of her indigent client will inevitably be less than effective.[37]

The defendants, of course, have their own problems with a system which effectively forces attorneys to neglect their indigent clients.[38] Walter Williams was arrested and charged

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Joan Biskupie, *Rehnquist's Year-End Report*, WASH. POST, Jan. 1, 2000, at A02. The American Bar Association (ABA) has recognized the difficulties even highly qualified attorneys face without meaningful access to "basic tools of adequate representation." Ira P. Robbins, *Towards a More Just and Effective System of Review in State Death Penalty Cases, Recommendations and Reports of the American Bar Association Task Force on Death Penalty Habeas Corpus*, 40 AM. U.L. REV. 1, 69 (1990).

[36] *See* Kate Jones, *Indigent Defense*, 25 CHAMPION 35, 35 (2001) (suggesting that time constraints and extensive workloads negatively impact attorney's ability to adequately represent his client's interest). Notably, the sizeable caseloads of attorneys representing indigent clients are not exclusive to Mississippi. Each attorney employed by the Fulton County Public Defender Program of Atlanta, Georgia handles an average of 530 felony cases per year, as well as quasi-criminal matters. Bright, *supra* note 25, at 1850. In Cook County, Illinois, public defenders struggle with more than twenty murder cases on any given day, more than one-third of which are capital cases. Vick, *supra* note 23, at 390. In New Orleans, Louisiana, public defenders often handle more than 70 felony cases at once. *Id.* In 1999 and 2000, the Department of Justice (DOJ) issued a report on the state of indigent defense in America, finding a lack of meaningful resources with which to prepare a defense, insufficient compensation for attorneys representing indigent clients, and overwhelming caseloads, among other problems. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE 2000, at app. 2 (2000); *see also* Bias v. State, 568 P.2d 1269, 1272-73 n.1 (Okla. 1977) ("[T]he expenditure of 255 hours on a murder case clearly is . . . burdensome, considering a lawyer has an average of 1,2000 billable hours per year.").

[37] *See* Makemson v. Martin County, 491 So. 2d 1109, 1114-15 (Fla. 1986) ("In our pecuniary culture the caliber of personal services rendered usually has a corresponding relationship to the compensation provided."). A 2001 report issued by the DOJ's Bureau of Justice Assistance (BJA) observed that "[e]very day, [public] defenders try to manage too many clients. Too often, the quality of service suffers." THE SPANGENBERG GROUP, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001).

[38] *See* Rigg, *supra* note 13, at 3 ("It is impossible to inspire clients' confidence

with murder in January of 1998.[39] He did not receive counsel until the day of his arraignment, more than eight months later.[40] Kenny Jamison had his first meeting with court-appointed counsel six months after his arrest.[41] Jamison described that brief encounter, stating: "[he] didn't ask no questions. He said there was a deal. It took about ten minutes; I got four years."[42] Would a paying client accept this kind of treatment from his attorney?

So long as the Mississippi Legislature persists in its refusal to implement a statewide public defender system with sufficient funds and resources to ensure that all indigent defendants receive quality representation, the fate of indigent defendants and their attorneys remains grim, thereby damaging the integrity and reliability of our system of justice.[43]

B. Documented Neglect

The Mississippi legislature's failure to address the indigent defense crisis cannot be overstated, particularly considering the wealth of available information documenting the egregious nature of the State's problems. Most recently, the NAACP Legal Defense and Educational Fund issued a report in 2003 describing the state's flagrant inadequacies in providing defense services to indigents.[44] Several problems are identified by the report, including lengthy delays prior to appointment of counsel for indigent criminal defendants, inadequate supervision of court-appointed attorneys, and outrageous caseloads.[45] The report goes on to conclude:

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in their legal representation when their court-appointed lawyers are paid at a level below minimum age or when the public defender's office appointed to represent them is understaffed with overwhelming caseloads.").

[39] Johnson, *supra* note 32, at 1A.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] As might be expected, funding shortages and high caseloads generally do not attract qualified, experienced attorneys. Bright, *supra* note 25, at 1852.

[44] NAACP, *supra* note 29, at 2.

[45] *Id.* at 6.

> With the exception of death penalty cases, the State of Mississippi does not contribute one dollar towards the representation of poor defendants. Instead, it requires counties to shoulder the full obligation of providing lawyers for the poor. It is an obligation that many counties cannot or will not honor.[46]

The NAACP's report is certainly not the first to document Mississippi's inadequacies. Studies commissioned by the Mississippi Bar Association throughout the 1990's found: (1) attorneys representing indigent clients in the state were not provided with adequate resources to aid in the preparation of their client's defense; (2) as a result, every aspect of indigent representation is compromised; (3) the costs imposed upon counties with small populations and high crime rates result in disproportionately large tax burdens; and (4) "[c]hronic underfunding of indigent defense has resulted in constitutional requirements for effective assistance of counsel often not being met and has adversely affected the administration of justice in Mississippi."[47] One of these reports, issued in January 1995, described the typical county defender's part-time arrangement as follows:

> In practice, counties contract with one or more part-time public defenders to do all of the indigent defense work in the county for a fixed annual amount . . . . In many instances, the contracting attorney does not receive additional funds for support staff, overhead costs, etc. Thus, the contract attorneys agree to represent an unlimited number of indigent defendants, regardless of the complexity of the cases and without guarantees of full reimbursement for support services, for a year based upon a fixed annual fee.[48]

This report also showed that Mississippi had the lowest per capita expenditure for indigent defense services of the twenty-seven geographically and demographically similar states included in the study.[49] A 1997 follow-up study reported that the problems identified by the initial report remained unresolved.[50]

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[46] *Id.*

[47] *Quitman I*, 807 So. 2d at 409.

[48] THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MISSISSIPPI: FINAL REPORT 19 (1995).

C. *Legislative Indifference*

Presently, Mississippi provides attorneys to represent indigent defendants using a county-based system, which gives the board of supervisors of each county the responsibility of providing indigent defense services in that county.[51] Section 99-15-17 of the Mississippi Code provides that compensation for counsel provided to indigent defendants must be paid by the county treasurer from the county's general fund.[52] Prior to its adoption of the county-based system, the Mississippi legislature considered several bills proposing state-wide public defender systems, none of which were adopted.

In 1970, the Judiciary Commission of the Mississippi Legislature recommended the creation of the office of State Public Defender and, at the local level, a panel of attorneys willing to handle cases on behalf of indigent defendants for an hourly rate plus actual expenses.[53] Although the Legislature did pass a law authorizing court-appointed representation for indigent defendants in certain cases, of the Judiciary Commission's recommendations survived.[54] In 1971, two bills were introduced in Mississippi's House of Representatives related to the provision of indigent counsel. The first, House Bill 410, would have provided for a statewide public defender system had it not died in committee.[55] The second bill, House Bill 750, was designed to create a state public defender's office, but failed to pass on the initial vote.[56]

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[49] *Id.* at 35-36 & tbl. 3-4.

[50] The Spangenberg Group, Update: The State of Indigent Defense Services in Mississippi 2 (1997).

[51] Miss. Code Ann. § 25-32-7 (1999); Miss. Code Ann. § 99-15-176 (2000); *Quitman I*, 807 So. 2d at 402.

[52] The Mississippi Supreme Court has upheld the constitutional validity of section 99-15-17 on grounds that the right to expend public funds belongs to the Legislature. *See* Mease v. State, 583 So. 2d 1283 (Miss. 1991); Wilson v. State, 574 So. 2d 1338 (Miss. 1990); Pruett v. State, 574 So. 2d 1342 (Miss. 1990).

[53] Mississippi Judiciary Comm'n, Report to the Legislature of 1970, at 2 (1970).

[54] Act of Apr. 5, ch. 490, 1971 Miss. Laws 604 (codified as amended at Miss. Code Ann. § 99-15-15 (2000)). This law provided that, if the court was satisfied that a defendant lacked financial means to afford a defense, it could appoint counsel to defend persons charged with a felony, a misdemeanor punishable by at least 90 days of incarceration, or acts of delinquency. *Id.* However, the Legislature limited appointed counsel's compensation to $500 in circuit court, $100 for

The following year, the Legislature enacted two local private laws establishing public defenders offices for Washington County and for the City of Jackson.[57] However, in 1973, similar local public defender bills for the Mississippi State Penitentiary and Hinds County were vetoed by the Governor.[58] Eventually, the Hinds county bill was passed over the Governor's veto and a bill establishing a public defender system for Warren County was passed without the Governor's signature.[59] In 1976, two bills proposing statewide systems for public defense died in committee.[60] Similar bills proposed in 1978 and 1979 met the same fate.[61]

Mississippi's current county-based system was established in 1979, when the Legislature passed Senate Bill 2430, autho-

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representation in a court not of record, $500 for representation on appeal, and a total of $1,000 for two attorneys representing a defendant in capital cases. *Id.*

[55] 1971 MISS. HOUSE J. 1264.

[56] 1971 MISS. HOUSE J. 1264.

[57] Act of May 4, 1972, ch. 867, 1972 Miss. Loc. & Priv. Laws 41 (establishing public defenders office for Washington County); Act of May 4, 1972, ch. 888, 1972 Miss. Loc. & Priv. Laws 57 (establishing public defenders office for the City of Jackson).

[58] 1973 MISS. HOUSE J. 1255 (proposing public defenders office for the State Penitentiary); 1973 MISS. HOUSE J. 1278 (proposing public defenders office for Hinds County). In 1974 and 1975, similar bills were vetoed by the Governor, which would have established public defender systems in Harrison, Jackson, Pike and Warren Counties. Symposium on Judicial Administration, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?*, 14 MISS. C. L. REV. 413, 472 (1994) [hereinafter Symposium on Judicial Administration].

[59] Act of Jan. 14, 1976, ch. 1011, 1975 Miss. Loc. & Priv. Laws 160 (establishing public defenders office for Hinds County); Act of March 28, 1975, ch. 852, 1975 Miss. Loc. & Priv. Laws 25 (establishing public defender system for Warren County).

[60] 1976 MISS. HOUSE J. 1830; 1976 MISS. SEN. J. 1902.

[61] Symposium on Judicial Administration, *supra* note 58, at 473-74.

rizing each county's board of supervisors to establish public defender offices.[62] Although bills calling for statewide public defender systems were introduced each year from 1993 to 1997, no further legislative action was taken until 1998, when the Legislature passed the Mississippi Statewide Public Defender System Act.[63]

The Mississippi Statewide Public Defender Act was designed to replace the county-based system with a full-time, state-funded public defender system resembling Mississippi's current District Attorney System.[64] The Act called for the formation of a statewide commission on indigent defense, and an office in every circuit district to provide indigent representation.[65] The commission would be authorized to appoint district defenders, establish performance and qualification standards for all attorneys within the system, distribute cases evenly between offices, and provide continuing legal training for its staff, among other responsibilities.[66]

Two years later, in what has been described as "the biggest setback of the year,"[67] the Legislature repealed the Act, without ever having provided the necessary funding to foster its implementation.[68] Conveniently, the programs authorized under the Act were conditioned upon the availability of funds appropriated by the Legislature.[69] Mississippi Attorney General Mike Moore explained "the intent of the Legislature was that the Public Defender Commission would cease to function as of June 30, 1999, unless funds were specifically appropriated for it . . . ."[70] The Legislature's refusal to appropriate funds necessary to establish the statewide public defender program rendered the Mississippi Statewide Public Defender System Act essentially meaningless.

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[62] Act of April 18, 1979, ch. 509, 1979 Miss. Laws 1099 (codified as amended at MISS. CODE ANN. § 25-32-1).

[63] Mississippi Statewide Public Defender System Act, ch. 575, 1998 Miss. Laws 939 (codified as amended at MISS. CODE ANN. § 25-32-1); *see also* THE SPANGENBERG GROUP, SPANGENBERG REPORT: MISSISSIPPI RECEIVES A NEW, STATE-WIDE, STATE FUNDED INDIGENT DEFENSE SYSTEM 9 (1998).

[64] SPAGENBURG GROUP, *supra* note 63, at 9.

[65] *Id.*

[66] *Id.*

[67] Terry Brooks & Shubhangi Deoras, *2000 State Roundup*, 15 CRIM. JUST. 51, 52 (2001).

[68] *Quitman I*, 807 So. 2d 401, 404 (Miss. 2002).

[69] *See* Op. Att'y Gen. 1999-0386 (1999), 1999 WL 1078447, at *1..

On July 1, 2000, the Mississippi legislature enacted laws establishing the Office of Capital Post Conviction Counsel, the Office of Capital Defense Counsel (OCDC), and the Mississippi Public Defender System Task Force.[71] The Offices of capital Post Conviction Counsel and Capital Defense Counsel were established to provide representation to indigent defendants facing the death penalty, and for post-conviction appeals in death penalty cases.[72] However, the creation of these offices has not completely relieved the counties of their burdens with respect to capital cases. County public defenders are still involved in these cases, according to Andre DeGruy, an attorney with the OCDC:

> We know that there are presently about 100 pending capital murder indictments. At least seventy are indigent cases. OCDC is handling sixteen of those cases but has local counsel on fifteen. These local attorneys are paid by the counties . . . . Since most counties have some form of public defender system, most would not incur additional cost for lawyers on capital cases. Of course when the public defender is dedicating his time to the capital case he is not spending time on the many other cases he has and often those clients are sitting in jail longer as pretrial detainees at county expense. In the counties that have public defender systems but do not have staff or contract investigators the counties would pay for an investigator if approved by the court. And all counties have to meet the expenses of court approved experts in the cases OCDC is not handling.[73]

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[70] *Id.*

[71] *Quitman I*, 807 So. 2d at 402 (citing MISS. CODE ANN. § 99-9-101 (2000); § 99-18-1 (2000), § 25-32-71 (2000)).

[72] Section 99-18-3 of the Mississippi Code established the office of Capital Defense Counsel, and Provides for state-funded compensation of attorneys in that office. MISS. CODE ANN. § 99-18-3 (2000). Section § 99-39-103 of the Mississippi Code established the Office of Capital Post-Conviction Counsel, whose attorneys are also to be compensated by state funds. MISS. CODE ANN. § 99-39-103 (2000).

[73] E-mail from Andre DeGruy, Capital Defense Counsel, Office of Capital De-

The members of the Mississippi Public Defender Task Force (Task Force) were given the responsibility of conducting a comprehensive study in order to determine the need for State-supported indigent defense counsel.[74] The Task Force found that "indigent defense remains a vexing problem for the counties,"[75] and unanimously concluded that "the costs of indigent defense should be shifted from the counties to an alternative funding source."[76] A subsequent report by the Study Commission on the Mississippi Judicial system found the county-based system to be "woefully inadequate," and concluded that a State-funded indigent defense system "is necessary in order to achieve maximum efficiency of Mississippi's judicial system."[77] The Legislature has simply ignored this advice. Since the repeal of the Public Defender Act, and the creation of the Task Force, legislative efforts to reform the State's public defense system have come to a grinding halt.

II. ONE COUNTY SAYS "ENOUGH": QUITMAN COUNTY V. STATE

Quitman County's financial woes were exacerbated by the 1990 trials of two indigent men accused of capital murder, which cost approximately $250,000.[78] The County's deficit, which totals over two million dollars, now precludes the County from spending money to expand existing programs or start new programs.[79] The majority of the County's expenditures (between eighty and eighty-five percent) are mandated by the state and federal governments, with the remainder limited by

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fense Counsel, to author (Aug. 24, 2004) (on file with author).

[74] MISS. CODE ANN. § 25-32-71 (2000).

[75] MISSISSIPPI PUBLIC DEFENDERS TASK FORCE, REPORT TO THE MISSISSIPPI LEGISLATURE 5 (2000).

[76] *Id.* at 3.

[77] STUDY COMM'N ON THE MISSISSIPPI JUDICIAL SYS., REPORT TO THE MISSISSIPPI LEGISLATURE 30 (2001).

[78] Salter, *supra* note 2.

[79] Brief for Appellant, *supra* note 7, at 8. The County was forced to decrease its contribution for hospital care to indigents by $30,000 in order to reduce its deficit. *Id.* at 9 n.7. As a result of the County's $12,000 cutback, a health clinic serving the poor can only afford to be open four days a week. *Id.*

government programs which require the County to match contributions in order to participate.[80] The County has been forced to withdraw financial resources formerly available to fund schools, hospitals, and law enforcement efforts.[81]

The County filed suit against the State in 1999, seeking a declaratory judgment that the State failed to provide an adequate statewide, state-funded system for the defense of indigent defendants.[82] Specifically, Count I of the County's complaint alleged that the State has breached its duties under Article 3, Section 26 of the Mississippi Constitution, which requires the State to provide adequate representation for indigent defendants.[83] In Count II of its complaint, the County asserted that the State failed to meet its obligations under the Public Defender System Act of 1998 (Public Defender Act).[84]

A. The Trial Court's Denial of the State's Motion to Dismiss

The State filed a motion to dismiss the claims made by the county, arguing: (1) that the County failed to state a claim for which relief could be granted; (2) the County's allegation that the State breached the Public Defender Act was moot; and, (3) the County lacked standing to bring suit against the State.[85] The circuit court found the County did have standing to sue because it has a "colorable interest in the State's meeting its constitutional obligations" and had suffered adverse effects from the State's failure to fulfill its constitutional mandate.[86] Also, the circuit court rejected the State's position that Count I of the complaint failed to state a claim for which relief could be granted, stating that the courts have the authority to require that the legislature provide a public defender system sufficient to meet the requirements of Article 3, Section 26 of Mississippi's Constitution.[87] However, the circuit court granted the State's motion to dismiss count II of the complaint because the Public Defender Act never actually became effective due to the Legislature's failure to provide the necessary funding for its enactment.[88]

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[80] *Id.* at 9. For example, the County contributed $33,250 to its public library as a condition of a state grant which, together with the County's contribution, allows the library to remain open. *Id.* at 9 n.8. The County also makes contributions to maintain soil conservation, access to educational programs, and service programs for farmers and homeowners. *Id.*

[81] *Quitman II*, No. 99-0126, slip op. at 21.

[82] *Quitman I*, 807 So. 2d at 403.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

The State appealed the circuit court's denial of its motion to dismiss Count I of Quitman County's complaint.[89] On appeal, the supreme court would determine whether Quitman County had standing to sue the State, and whether the County's complaint was sufficient to state a claim for which relief could be granted.[90]

B. The Interlocutory Appeal to the Mississippi Supreme Court

The County's suit was filed on behalf of itself and its taxpayers based upon its "claim that the State has breached its constitutional duty to provide effective assistance of counsel to Mississippi's indigent criminal defendants."[91] The State, pointing to the fact that the County's complaint did not name any individual who had actually received ineffective assistance of counsel, argued that the County lacked standing to sue.[92] Because the protections afforded by the Sixth Amendment are exclusively afforded to criminal defendants, the State argued that the County had no right to file a suit based on an ineffective assistance of counsel claim.[93] Recognizing the severe financial burden placed on individual counties to provide indigent defense funding, as well as the devastating effects of the county-based system on the County's criminal justice system, the court concluded that the County "asserted a colorable interest" sufficient to contest the system, and therefore had standing.[94]

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[87] *Id.* at 403-04. Article 3, section 26 of the Mississippi Constitution provides, in relevant part:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed . . . .

MISS. CONST. art. 3, § 26 (amended 1994).

[88] *Quitman I*, 807 So. 2d at 404.

[89] *Id.* The parties conceded that the lower court's decision to dismiss Count II of the County's complaint was not before the Mississippi Supreme Court on appeal. *Id.*

[90] *Id.*

[91] *Id.*

[92] *Quitman I*, 807 So. 2d at 404. The County's complaint named the members

The County claimed that two statutes, section 25-32-7[95] and section 99-15-17 of the Mississippi Code,[96] imposed unconstitutional obligations on counties to fund representation for indigent defendants, in violation of Article 3, Section 26 of the Mississippi Constitution.[97] Conversely, the State argued that the County's allegations were insufficient to overcome the presumption of constitutionality which would apply to the statutes

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of the County Board of Supervisors and the taxpayers as plaintiffs. *Id.*

[93] *Id.*

[94] *Id.* at 405. The court noted that Mississippi has "quite liberal" standing requirements, and is "more permissive in granting standing to parties who seek review of governmental actions." *Id.* (quoting Van Slyke v. Bd. of Trustees of State Institutions of Higher Learning, 613 So. 2d 872, 875 (Miss. 1993)).

[95] Section 25-32-7 of the Mississippi Code provides:

> The public defender shall be provided with office space, secretarial assistance, and all reasonable expenses of operating the office, at least equal to or more than the county prosecuting attorney, or the district attorney if the public defender represents the entire circuit court district. The compensation and expenses of the public defender's office shall be paid by the county or counties if two (2) or more counties are acting jointly. The funds shall be paid upon allowance by the board of supervisors by order spread upon the minutes of the board.

MISS. CODE ANN. § 25-32-7 (2003).

[96] Section 99-15-17 of the Mississippi Code provides that "[t]he fees and expenses [of counsel for indigent defendants] as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced." *Id.* § 99-15-17 (2003).

[97] *Quitman I*, 807 So. 2d at 403. The County's complaint did not assert a cause of action under the Sixth Amendment to the United States Constitution. *Id.* at 406.

at issue.[98] The court began its analysis by noting that Article 3, Section 26 of the Mississippi Constitution "has been interpreted to create a duty on the part of the State to provide effective assistance of counsel to indigent defendants."[99] Further, the court called attention to its former opinions expressing reservations about the validity of the county-based indigent defense system.[100] In one prior opinion, the court suggested that:

> the Legislature may wish to reconsider the funding of attorney representations of indigents. In fact, we would encourage the Legislature to review the system and provide funds for the representation of indigent defendants in capital cases from State funds rather than county funds. Since the State funds the prosecution in these cases, why not the defense?[101]

The court went on to note that Quitman County did not argue that the statutes at issue were unconstitutional per se.[102] Rather, the County challenged the constitutional validity of the statutes on grounds that the State improperly shifted its duty to provide indigent representation to the counties.[103]

The State argued that because the Legislature has the constitutional authority to require counties to provide representation for indigent defendants, the County's complaint failed "to allege a palpable conflict between the actions of the Legislature and the Constitution," requiring dismissal.[104] However, the court recognized that the County's complaint did not challenge the State's constitutional authority to require county funding of indigent defense services.[105] Instead, the County alleged that the county-based system is unconstitutional in that it shifts the State's obligation to provide indigent defense to financially-strapped counties, resulting in "systemic ineffective assistance of counsel that has gone unchecked and unremedied by the State."[106] Therefore, the court found that the true question raised by the County's complaint was:

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[98] *Id.* at 406.

[99] *Id.* at 407.

[100] *Id.*

[101] Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990); *see also* State v. Wigley, 624 So. 2d 425, 429 (La. 1993) (requiring compensation for attorneys assigned to represent indigent defendants "in order to be reasonable and not oppressive . . .").

[102] *Quitman I*, 807 So. 2d at 407.

[103] *Id.*

[104] *Id.*

> whether, assuming the State has failed in its duty to provide effective indigent defense, the county-based system has resulted in the inability of the judiciary to operate in an independent and effective manner to the extent that this Court must, of necessity, interfere in this traditionally legislative function and order the Legislature to establish a statewide, state-funded system of indigent criminal defense.[107]

The court concluded that the County's complaint alleged facts sufficient to demonstrate the State's breach of its constitutional obligation to provide effective assistance of counsel to indigent defendants.[108]

Further, the court declared that judicial intervention is required where constitutional rights are at stake, and the Legislature fails to fulfill its obligations.[109] Although the court recognized that the Legislature typically has the authority to control the appropriation of funds to the judicial breach, it reasoned:

> the courts may act in cases of necessity where the Legislature fails to furnish the essentials required for the operation of an independent and effective court. Certainly, if adequate facilities are essential to the administration of justice, so is effective representation.[110]

The court remanded the case to the circuit court, instructing that Quitman County would be entitled to relief if it could show the existence of "systemic constitutional deficiencies."[111]

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[105] *Id.*

[106] *Id.*

[107] *Id.* at 410.

[108] *Quitman I*, 807 So. 2d at 409.

[109] *Id.*

[110] *Id.* at 410.

C. On Remand to the Circuit Court

Despite the wealth of evidence showing the grossly inadequate nature of defense services rendered to indigent defendants, on remand, the circuit court found that the County fell short "of demonstrating that indigent defendants in Quitman county are receiving ineffective assistance of counsel."[112] Further, the court held that the County did not prove that the current system of indigent representation "has resulted in the inability of the judiciary to operate in an independent and effective manner."[113]

The court found evidence that the Legislature was "not oblivious to the problems faced by our counties and is attempting to deal with this difficult issue, although at a slow place."[114] In support of this proposition, the court referenced the creation of the Office of Post Conviction Counsel and the Office of Capital Defense Counsel, which "took the burden of funding indigent defense in capital cases from the counties at the trial, appellate, and post-conviction stages."[115] While the court acknowledged that Legislative creation and funding of a statewide system would be best, it found that the current system was sufficient to meet the constitutional demands of effective assistance of counsel.[116] The court announced its approval of the dissenting opinion in *State v. Quitman County*, which asserted that "[i]t is the Legislature which holds the key to solving these problems, not this Court by impressive and excessive exercise of judicial authority."[117] The court declined to exercise its inherent power to order Legislative action, stating that "this is [not] one of those rare occasions when the courts should exercise its inherent power."[118] As such, the court denied the County's requests for relief.

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[111] *Id.* The court listed factors that, if established by the County on remand, would entitle it to relief, including:

> (1) inadequate funding by the State;
> (2) a lack of resources resulting in substandard representation;
> (3) a lack of State oversight of indigent defense system;
> (4) a disproportionate burden on less-populated counties with high crime rates; and
> (5) chronic under-funding having a negative impact on the administration of justice.

Id. at 408-09.

[112] *Quitman II*, No. 99-0126, slip op. at 26. In support of this conclusion, the court noted that the County presented no proof from any individual claiming to have received ineffective assistance of counsel, nor did it present proof that a decision has been overturned in the County on grounds of ineffective assistance. *Id.* at 22. The court also noted that none of the County's experts testified that the representation provided by the public defenders was incompetent. *Id.* at 23. Further, the court relied on self-serving testimony from the County's public defenders and circuit judges, concluding that they were "in a better position than the Court to judge the weight of their caseload." *Id.* at 22.

[113] *Id.* at 27.

[114] *Id.* The court considered the Legislature's creation of two capital defense offices in 2000 to be "a major step in improving our indigent defense system." *Id.* at 26. It also found that the Legislature's creation of the Mississippi Public Defenders Task Force in 2000 to be an acknowledgement "that indigent defense is

The County's appeal, which is currently pending before the Mississippi Supreme Court, affords an opportunity for the high court to resolve the State's indigent defense crisis. A review of case precedent from Mississippi and other jurisdictions shows that, because the Legislature has failed to comply with its constitutional obligation to ensure effective assistance of counsel to all indigent defendants, the court has within its own authority the power, and the duty, to provide a remedy for the State's constitutionally inadequate system of indigent defense.

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an area in need of further study . . . ." *Id.* It is hard to believe that additional studies are necessary, given the bulk of information already reported by organizations such as the NAACP and the Spangenberg Group. Further, the Legislature has reduced funding for the capital defense offices each year for the past three years. Brief for Appellant, *supra* note 7, at 25. The Legislature has increased funding for district attorneys' offices. *Id.*

[115] *Quitman II*, No. 99-0126, slip op. at 26.

[116] *Id.* at 26.

[117] *Quitman I*, 807 So. 2d at 413 (Pittman, C.J., dissenting).

[118] *Quitman II*, No. 99-0126, slip op. at 26.

III. THE COURT'S INHERENT AUTHORITY TO ENSURE ITS OWN EFFECTIVENESS AND PROTECT FUNDAMENTAL RIGHTS

A. Judicial Autonomy and Separation of Powers

Although the powers belonging to each branch of government are limited by the doctrine of separation of powers, the courts possess the inherent authority to protect their own integrity and to make any such orders necessary to ensure that integrity.[119] The court's inherent authority includes the power to compel funding from the other branches of government, as explained by the Florida Supreme Court:

> The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the court's ability to make effective their jurisdiction . . . . The invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights.[120]

To be certain, it is the Legislature's duty to provide the funds and facilities necessary for the efficient operation of the courts.[121] However, the Legislature's authority is not without boundaries.[122] If the Legislature "fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its constitutional mandate, and the Judicial branch has the authority as well as the duty to see that courts do not atrophy."[123]

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[119] Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988). In fact, the courts may use their inherent powers to cure any constitutional violation. *See, e.g.,* Client's Counsel v. Pierce, 711 F.2d 1406, 1425-26 (8th Cir. 1983) (upholding validity of court ordered remedy where Department of Housing and Urban Development unreasonably delayed efforts to desegregate housing projects); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) (rejecting Mississippi's argument that shortage of funds barred court from requiring state to remedy constitutional violations at Parchman State Penitentiary); Davis v. East Baton Rouge Parish Sch., 214 F. Supp. 624, 625-26 (E.D. La. 1963) (ordering state to present plan for desegregation of school district "with all deliberate speed"); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 754-55 (N.H. 2002) (requiring state funding to provide constitutionally adequate education);. Perhaps the most famous example of the exercise of judicial authority is the Supreme Court's decision in *Brown v. Board of Education*, ordering state implementation of desegregation to be accomplished "with all deliberate speed."). 349 U.S. 294, 301 (1955).

[120] Rose v. Palm Beach County, 371 So. 2d 135, 137 (Fla. 1978); *see also* State *ex rel.* Durkin v. City Council, 459 N.E.2d 213, 216 (Ohio 1984) ("The courts' authority to effectuate the orderly and efficient administration of justice without monetary or procedural limitations by the legislature is said to be within the inherent powers of the courts.").

The principal of judicial independence is not a recent trend. In fact, it dates back to the very origins of our government. In *The Federalist Papers*, Alexander Hamilton declared that "[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution."[124] Courts have recognized the power of the courts to compel proper funding from the legislative branch:

> A legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Leg-

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[121] *Hosford*, 525 So. 2d at 798; *see also* Folsom v. Wynn, 631 So. 2d 890, 900 (Ala. 1993) (recognizing legislature's power to appropriate funds to judiciary while reserving court's inherent authority to determine adequacy and reasonableness of such funds).

[122] Wilson v. State, 574 So. 2d 1338 (Miss. 1990) (recognizing that scope of Legislature's authority "does not cover the entire spectrum").

[123] *Id.*; *see also* Sheff v. O'Neill, 678 A.2d 1267, 1294-95 (Conn. 1996) (Berdon, J., concurring) ("[t]he executive and legislative branches of the state government should be given an opportunity to remedy what is now a terrible wrong . . . the state must act with 'all deliberate speed.'" (citation and footnote omitted) (quoting Brown v. Bd. of Educ., 349 U.S. 293, 301 (1955)); State v. Peart, 621 So. 2d 780 (La. 1993) (explaining that state legislature's failure to take action with respect to reforming public defender system authorized court to exercise its inherent powers and supervisory jurisdiction); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (explaining that courts must exercise their inherent powers to preserve justice where "harmonious cooperation" between branches of government breaks down). Courts in other states have resorted to self-help, and even threats, to ensure the proper funding and operation of the judicial system. In *Noble County Council v. State ex rel. Fifer*, the Indiana Supreme Court declared the court's authority to order the appropriation of county funds to pay a probation officer's salary by writ of mandamus. 125 N.E.2d 709, 719 (1955). However, the court declined to actually issue the writ unless the legislature did not comply with its decision. *Noble County*, 125 N.E.2d at 719. Missouri's Supreme Court affirmed the juvenile court's right to hire and fix compensation for its employees in Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. 1970)).

[124] THE FEDERALIST No. 78 (Alexander Hamilton).

> islature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches—the Executive, the Legislative and the Judicial.[125]

The judiciary is not inferior to the legislative branch, and should not be expected to endure legislative indifference to constitutional violations.[126] The Mississippi Supreme Court has held that no court is required to accept conditions which prohibit the independent and effective operation of the justice system.[127] Furthermore, the status of the court system as a separate and co-equal branch of government empowers the courts to ensure the effective administration of justice without legislative interference.[128] As an independent, co-equal branch of government, the courts are obligated to do what is "necessary to accord due process in accordance with the constitution of the State of Mississippi and the Constitution of the United

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[125] *See, e.g.,* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971); *see also In re* Alamance County Court Facilities, 405 S.E.2d 125, 129 (N.C. 1991) (opining that court's inherent powers are so essential to "the direct administration of justice" that deprivation of those powers by Legislature would destroy the efficiency of the courts).

[126] *See* Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863, 866 (1989) ("The judiciary is not merely an agency of the legislature, but is instead a constitutionally established separate, independent, and co-equal branch of government."); Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687, 1692 (1983) (asserting that constitutional risks justify invocation of court's inherent power).

[127] Hosford v. State, 525 So. 2d 789, 797-98 (Miss. 1988).

[128] *Hosford*, 525 So. 2d at 797-98. In *State v. Blenden*, the former Mississippi Supreme Court Justice Banks, writing for the majority, explained: "[w]hen the State enters the court as a litigant, it places itself on the same basis as any other litigant; subjecting itself to the inherent authority of the court to control actions before it, just as any other litigant." 748 So. 2d 77, 88-89 (Miss. 2000). The *Blenden* court affirmed the lower court's exercise of its inherent authority to levy monetary sanctions against the State for discovery violations in a criminal proceeding. *Blenden*, 748 So. 2d at 77-89; *see also* Newell v. State, 308 So. 2d 71 (Miss. 1975) (holding that doctrine of separation powers provided basis for judiciary's authority to promulgate rules of procedure).

States."[129] When legislative actions are constitutionally inadequate, the courts must intervene.[130]

Further, the right to assistance of counsel can be properly characterized as judicial in nature, placing the State's indigent defense crisis within the scope of the powers of the courts.[131] As such, the courts of Mississippi have a duty to require that indigent defendants are afforded effective assistance of counsel as guaranteed by the Sixth Amendment.[132] The courts are constitutionally mandated to appoint counsel for indigent defendants, and are in a unique position to ensure the delivery of indigent defense services. That authority properly extends to the power to compel the Legislature to properly fund and maintain a statewide public defender system.[133]

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[129] *Blenden*, 748 So. 2d at 89 n.1. Jeffrey Jackson explains the balance that must be struck between the legislative power of the purse and judicial independence as follows: "[the court's] authority to exercise (or to compel the exercise of) legislative power to preserve separateness, which at first blush appears to be a violation of concepts of separateness and an invasion of legislative autonomy, is instead necessary to maintain that separateness." Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 225 (1993).

[130] Bailey v. State, 463 So. 2d 1059, 1062 (Miss. 1985).

[131] *See* Pruett v. State, 574 So. 2d 1342, 1343 (Miss. 1990) (Robertson, J., concurring) ("If an adequate courthouse is essential to the administration of justice, so are competent counsel."). In *Smith v. State*, the New Hampshire Supreme Court determined that "[i]t is peculiarly within the judicial province" to determine compensation of court-appointed attorneys, adding: "[w]ithout proper court control of court-appointed counsel, and indeed without adequate compensation for those attorneys, it might be impossible to obtain valid criminal convictions in future prosecutions of indigent defendants." 394 A.2d 834, 839 (N.H. 1978).

[132] In *White v. Board of County Commissioners*, the Supreme Court of Florida upheld a trial court's exercise of its inherent authority to require that an attorney representing an indigent defendant should be compensated at a fee in excess of the statutory minimum. 537 So. 2d 1376 (Fla. 1989). The court found that the statutory fee cap was "unconstitutional when applied in such a manner that curtails the court's inherent power to secure effective, experienced counsel for the representation of indigent defendants in capital cases." *White*, 537 So. 2d at 1379.

[133] Case precedent reveals that several courts have exercised the authority to compel funds and actions from the other branches of government. *See* Pena v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984) (declaring that it is within inherent powers of judiciary to determine and compel payment of sums necessary to carry out its responsibilities); M. *ex rel.* T. v. S., 404 A.2d 653, 656 (N.J. Sup. Ct. App. Div. 1979) ("[Judges] must have the power to compel the appropriate and expen-

B. *Declarations of Judicial Power by the Mississippi Supreme Court*

In *Hosford v. State*, the Mississippi Supreme Court acted on its inherent authority to preserve the integrity of the judicial branch and its functions.[134] A one-day trial in the Greene County courthouse was interrupted over thirty-five times by noise from trucks passing on a highway directly outside the courtroom.[135] The noise was so distracting that some of the jurors were unable to hear witness testimony.[136] Although the exclusive statutory authority to maintain adequate courtroom facilities was vested in the county board of supervisors by the Legislature, the court exercised its authority to intervene.[137] The court explained that "if [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively," the courts affected by that failure are entitled to intervene.[138] Acting upon the right of the judiciary to "preserve and protect its own independence," the court ordered Greene County's board of supervisors to pro-

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diture of funds by the coequal executive and legislative branches of government . . . ."); Commonwealth *ex rel* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) ("[T]he "Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice . . . ."). Furthermore, courts have rejected arguments by states that a remedy is unaffordable where constitutional rights are at stake. *See, e.g.,* Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) ("Shortage of funds is not a justification for continuing to deny citizens their constitutional rights."); State v. Wigley, 724 So. 2d 425, 429 (La. 1993) ("[B]udget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities."); DeRolph v. State, 780 N.E.2d 529, 530, 532 (Ohio 2002) ("We are not unmindful of the difficulties facing the state, but those difficulties do not trump the Constitution . . . . We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate [requiring adequate financing of school system] must be met. The Constitution protects us whether the state is flush or destitute."), *cert. denied*, 124 S. Ct. 432 (2003).

[134] 525 So. 2d 789 (Miss. 1988).

[135] *Hosford*, 525 So. 2d at 794.

[136] *Id.* at 795. Defense counsel testified that the highway was situated approximately fifty to sixty-five feet from the courtroom windows, which were open. *Id.*

[137] *Id.* at 798.

[138] *Id.*

vide adequate courtroom facilities.[139] The court concluded that, because "there is no fourth branch of government to turn to," the courts have the authority to protect the judicial branch.[140]

The court reaffirmed its authority to intervene where the Legislature fails to comply with constitutional duties in *Wilson v. State*.[141] In this case, two attorneys representing an indigent defendant charged with capital murder spent totals of 779.2 and 562 hours, respectively, on the defendant's case.[142] The attorneys filed a motion for compensation at sixty dollars per hour, which was denied.[143] Section 99-15-17 of the Mississippi Code limits the compensation a lawyer may receive for his representation of an indigent defendant to $1000.[144] Wilson's attorneys challenged the constitutionality of section 99-15-17, arguing that the statute deprives indigent defendants of their right to effective assistance of counsel.[145]

The court, using the canons of statutory construction, upheld the constitutional validity of section 99-15-17 by interpreting its language "to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case, i.e., the lawyer will receive a pro rata share of actual overhead."[146]

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[139] *Id.*

[140] *Id.* The *Hosford* court expressed its concern that a contrary holding would reduce "courts to supplicants only of the Legislature." *Id.* at 797.

[141] 574 So. 2d 1338, 1339 (Miss. 1990); *see also Hosford*, 525 So. 2d at 798 (reaffirming trial court's authority to compel county to provide noise-free courtroom).

[142] *Wilson*, 574 So. 2d at 1339.

[143] *Id.*

[144] Section 99-15-17 provides as follows:

> The compensation for counsel for indigents appointed as provided in Section 99-15-15, shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars ($1,000.00) for representation . . . . The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

MISS. CODE ANN. § 99-15-17 (2000).

[145] *Wilson*, 574 So. 2d at 1340. Wilson's attorneys further argued that the statute resulted in an unconstitutional taking of property in violation of section 17 of the Mississippi Constitution, and contended that the statutory limitation on fees constituted a violation of the Equal Protection Clause. *Id.*

Although the court elected to uphold the statute's validity, it also recognized the prerogative of the judiciary to ensure the independent and effective operations of the courts.[147] Where the Legislature has failed to provide the necessary means, it becomes the "absolute duty" of the courts "to act, and act promptly."[148] The *Wilson* court openly encouraged the Legislature to reconsider the State's public defender systems in light of its opinion.[149] Finally, the court expressed its hopes that its interpretation of § 99-15-17 would result in higher levels of attorney participation in the indigent defense system, and that the Legislature might "examine the system and take such measures as it deems fit to improve the system."[150]

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[146] *Id.* at 1340. The court reasoned that such an interpretation would protect the attorney's financial interests because the attorney will not "actually lose money." *Id.* at 1341. Even after reimbursement for "actual expenses," however, the attorneys here would have received less than minimum wage for their services. The attorney who worked 779.2 hours made $1.28 per hour, and the attorney who worked 562 hours made $1.78 per hour. Further, the court rejected the argument that the statute's limitation on compensation directly resulted in effective assistance of counsel, explaining that ineffective assistance claims are better suited for a case by case determination. *Id.*

[147] *Id.* at 1339-40.

[148] *Id.* at 1340 (citing Hosford v. State, 525 so. 2d 789, 797-98 (Miss. 1998)).

[149] *Id.* In *Pruett v. State*, which was argued on the same day as *Wilson*, the court reiterated its holding in *Wilson*, upholding the constitutional validity of section 99-15-17 of the Mississippi Code. 574 So. 2d 1342 (Miss. 1990). However, Justice Anderson authored a vigorous dissenting opinion, initially prepared as the majority opinion. *Pruett*, 574 So. 2d at 1343 (Anderson, J., dissenting). Justice Anderson asserted that the courts have the authority, as well as the obligation, to provide adequate compensation for attorneys representing indigent clients. *Id.* at 1352 (Anderson, J., dissenting). Expressing concerns over the inadequate sums paid to defense counsel for the "extraordinary amount of time, effort, energy and expertise" put forth towards the representation of indigent defendants, he urged: "[o]ur system is crying for help, and this Court must step forward to provide the antidote for the cure or at least provide the necessary assistance to get temporary relief." *Id.* at 1343-44 (Anderson, J., dissenting). Justice Anderson also noted that the court had previously expressed its inherent authority to makes rules affecting the judiciary, and concluded that "the courts are under a constitutional obligation to provide the accused in a felony case with counsel." *Id.* at 1352 (Anderson, J., dissenting).

[150] Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990). In his concurrence,

While the court did not get the results it hoped for after its decision in *Wilson*, it has been able to inspire action in other cases, indicating that the court does have the power to compel legislative change. The court confronted the issue of post-conviction assistance of counsel for indigent defendants facing the death penalty in *Jackson v. State*.[151] The *Jackson* court held that death row petitioners were entitled to assistance of counsel, at the State's expense, to pursue post-conviction appeals.[152] The court noted the Legislature's awareness that Mississippi's death row inmates were repeatedly unable to obtain counsel, and refused to "sit idly by," waiting for the Legislature to enact a solution.[153] In response to this decision, the Mississippi Legislature enacted section 99-15-18 of the Mississippi Code, which created a full-time, state-funded office to procure representation for indigent death row inmates pursuing post-conviction relief.[154] Similarly, in *Newell v. State*,[155] the court involved its inherent authority to promulgate rules of procedure by holding that procedural statutes enacted by the Legislature impaired the efficient administration of justice in violation of the constitution, and the doctrine of separation of powers.[156]

Justice Robertson stressed the importance of competent counsel, finding section 99-15-17 to be unconstitutional as applied. *Wilson*, 574 So. 2d at 1341-42 (Robertson, J., concurring). Justice Robertson asserted that the statutory cap on attorney's fees severely inhibited the State's ability to fulfill its duty to provide effective assistance of counsel to each person accused of a crime, and expressed his belief in the court's authority to overrule the statute at issue and order reasonable compensation for court appointed by the court. *Id.* (Robertson, J., concurring) (citing Hosford v. State, 525 So. 2d 7899 (Miss. 1988)). Although he disapproved of the majority's departure from *Hosford*, Justice Robertson concurred in the *Wilson* court's holding and rationale, reasoning that the majority's interpretation of the statute would empower the circuit courts to order delivery of monetary compensation to attorneys representing indigent clients. *Id.* (Robertson, J., concurring).

[151] 732 So. 2d 187 (Miss. 1999).

[152] *Jackson*, 732 So. 2d at 191.

[153] *Id.* at 191.

[154] MISS. CODE ANN. § 99-15-18 (Supp. 2004).

[155] 308 So. 2d 71 (1975).

[156] *Newell*, 308 So. 2d at 78.

IV. So We Have the Authority, But How Do We Use It?

Prior decisions of the Mississippi Supreme Court express not only the position that the court has inherent abilities to compel legislative action, but also the court's preference for a state-funded system of indigent representation. In *Wilson*, the court encouraged legislative review of the indigent defense system.[157] In *Mease v. State*, six justices implored the Legislature to "address the problem of indigent representation on a statewide basis, rather than thrust the burden on financially-strapped counties."[158] Justice Anderson, dissenting in *Pruett v. State*, wrote that the State's indigent defense system "is crying for help."[159] It is clear that the court recognizes the deficiencies of the current system. What may not be so clear is what it can do about it. Cases from other jurisdictions provide viable options.

In an attempt to address inadequate indigent defense programs, two courts have created rebuttable presumptions that indigent clients have not received effective assistance of counsel. The Supreme Court of Arizona found that a county's system of selecting attorneys to represent indigents violated the rights of indigent defendants to due process and effective assistance of counsel in *Smith v. State*.[160] Mohave County used a bid contract system to recruit public defenders, assigning the representation of all indigent defendants in the county to the most successful bidders.[161] The contracts awarded placed no limitation on caseloads, employed no criteria for evaluating the experience or ability of prosecutive bidders, and were actually awarded to the lowest bidders.[162] The court found that Mohave Count's system militated against effective assistance of counsel because the system failed to: (1) consider the amount of time an attorney would need to spend to represent his indigent clients; (2) fund support services, such as investigators, law clerks, and assistance; (3) consider the experience or ability of the attorney; and (4) consider the complexity of each case.[163] As a result, the court held that the system raised "an inference that the adequacy of representation is adversely affected by the system."[164] Although the presumption of ineffective assistance was rebutted in this case, the court found the county's system overburdened public defenders such that they could not be "reasonably effective."[165] The court cautioned that the county's continued used of its current method of selection and compensation of counsel would raise a rebuttable presumption of ineffective assistance of counsel in trials commenced prior to this decision.[166] Shortly after the court's decision, Mohave County reformed its system of indigent defense, resulting in increased expenditures and improved quality of representation.[167]

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[157] Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990).

[158] 583 So. 2d 1283, 1284-85 (Miss. 1991) (Prather, J., concurring).

[159] 574 So. 2d 1342, 1344 (Miss. 1990) (Anderson, J., dissenting).

[160] 681 P.2d 1374 (Ariz. 1984).

[161] *Smith*, 681 P.2d at 1379.

[162] *Id.* at 1379. In the four years prior to the *Smith* case, the county accepted the lowest bids offered with the only exception being a bid from an attorney held in contempt of course. *Id.*

Similarly, the Louisiana Supreme Court found the indigent defense system in New Orleans insufficient to provide effective assistance of counsel in *State v. Peart*.[168] In this case, the trial court conducted hearings on indigent defense services being provided to defendants. At those hearings, the court found that one lawyer appointed to defend an indigent man was handling seventy active felony cases at the time of his appointment, and that his clients typically spent between thirty and seventy days in prison before he met with them.[169] Between January and August of 1991, the attorney represented 418 defendants, and had one serious case scheduled for every trial date during that time.[170] After an examination of the New Orleans indigent defense system, the Louisiana Supreme Court found that, generally, indigent clients were not afforded effective assistance of counsel due to defenders' excessive caseloads and insufficient support.[171] The court also found, within its inherent powers, the authority "to fashion a remedy which will promote the orderly and expeditious administration of justice."[172] As a result, the court remanded the case, with instructions to hold individual hearings for all indigent defendants asserting similar claims, applying a rebuttable presumption of ineffective assistance of counsel.[173] Along with this holding, the court sent a stern warning to the Legislature:

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[163] *Id.* at 1381.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1384.

[167] Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 502 (1991).

[168] 621 So. 2d 780 (La. 1993).

[169] *Peart*, 621 So. 2d at 784.

[170] *Id.* at 784.

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.[174]

Further, the court prohibited the defendant's prosecution to go forward until he was provided with effective assistance of counsel.[175] During the next legislative session, the State increased funding for public defenders by five million dollars and created a task force, whose recommendations eventually led to the adoption of a statewide public defender board.[176]

More recently, in *New York County Lawyers' Association v.*

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[171] *Id.* at 790.

[172] *Id.* (quoting State v. Mims, 329 So. 2d 686, 688 (La. 1976)).

[173] *Id.* at 783.

[174] *Id.* at 791. Another state paving the way for court-led reform is Oklahoma. the Supreme Court of Oklahoma established guidelines for compensation of court-appointed counsel "until such time as the Legislature considers these matters." *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990).

[175] *Peart*, 621 So. 2d at 792.

[176] Chief Justice Pascal F. Calogero, Jr., *The State of Indigent Defense in Louisiana*, 42 LA. B.J. 454, 457-48 (1995). Similarly, when the American Civil Liberties Union (ACLU) brought suit against a public defender in Connecticut, challenging the adequacy of the state's public defender system, the governor and the public defender responded by agreeing to a settlement which resulted in additional funding and an increase in staff. Bernhard, *supra* note 21, at 327-28.

State,[177] the court issued a preliminary injunction directing the State of New York to increase the rate of compensation for court-appointed counsel to ninety dollars per hour.[178] The New York County Lawyers' Association (NYCLA) commenced the action against the State, alleging that the State's failure to provide adequate compensation for court-appointed attorneys created a substantial risk that indigent litigants would be denied their rights to due process and effective assistance of counsel.[179] The court began by recognizing its own authority to grant a temporary injunction compelling specific conduct,[180] reasoning that it is within the province of the judiciary to grant "prospective relief to secure constitutional standards ins tate proceedings based on evidence of the likelihood of depriving fundamental and statutory rights . . . ."[181] If the NYCLA could establish: (1) a likelihood of success on the merits, (2) that the denial of relief would cause irreparable injury, and (3) "a balance of the equities tipping in [its] favor," it would be entitled to relief.[182]

The State argued that the injunction should be denied because NYCLA did not intend to show individual harm resulting from ineffective assistance of counsel pursuant to *Strickland v. Washington*.[183] The court rejected this contention, reasoning that *Strickland* is not a proactive solution, and "provides no guarantee that the indigent will receive adequate assistance of counsel"because the right to effective assistance of counsel includes rights that do not necessarily affect the outcome of the case.[184] The court found that when fundamental constitutional rights are at risk, evidence establishing a likelihood of the deprivation of those rights was enough to warrant a grant of preliminary relief.[185] The court found sufficient evidence that indigents would be likely to receive ineffective assistance of counsel due to the inadequate compensation provided for court-appointed counsel by existing state laws.[186] While it agreed that the expenditure of funds was a task best left to the other branches of government, the court advised that the doctrine of separation of powers does not give one branch of government the power to impeded the others from carrying out their peculiar duties and obligations.[187] By its failure to compensate court-appointed attorneys at an adequate rate, the State compromised the effective operation of the courts and the quality of representation for indigent defendants.[188] In the absence of legislative action, the court possessed the inherent authority to demand proper payment for court-appointed counsel.[189] Accordingly, the court issued a mandatory preliminary injunction directing that the State pay court-appointed attorneys at a rate of ninety dollars an hour until such time that the Legislature modified the existing law.[190]

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[177] 745 N.Y.S.2d 376 (N.Y. Sup. Ct. 2002).

[178] *N.Y. County Lawyer's Ass'n*, 745 N.Y.S.2d at 438.

[179] *Id.* at 380 n.3.

[180] *Id.* at 382. The court distinguished the NYCLA's burden from that of a movant seeking an injunction to maintain the status quo, requiring a showing that extraordinary circumstances warrant the relief." *Id.* (citation omitted).

[181] *Id.* at 385.

[182] *Id.*

[183] *Id.* at 383.

[184] *Id.* at 382.

In 2003, the New York County Supreme Court made its temporary solution permanent, granting permanent injunctive and declaratory relief in the form of a pay increase to appointed counsel.[191] The court directly contributed the indigent defense crisis to "[t]he pusillanimous posturing and procrastination of the executive and legislative branches."[192] The state's faillure to increase hourly rates for appointed counsel violated the constitutional right to "meaningful and effective representation" by obstructing the proper functioning of the courts.[193] From the evidence before it, the court found indigent litigants were at an "unreasonable risk" of being subjected to the unfortunate effects of an unreliable legal system.[194] The failing indigent defense system, according to the court, was "a direct result of the legislature's failure to provide adequate compensation to assigned counsel."[195] The court recognized that the allocation of funding for public defenders is a responsibility typically belonging to the legislative branch.[196] However, the court found its decision justified by the refusal of its coequal branches to comply with constitutional obligations.[197]

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[185] *Id.* at 385.

[186] *Id.* at 386. The court accepted NYCLA's uncontroverted evidence of injury resulting from the unavailability of counsel, including prolonged separation of children from their parents during neglect proceedings, extended detention of juveniles waiting for counsel, and prolonged periods of pre-trial confinement in criminal cases. *Id.*

[187] *Id.* at 385, 386.

[188] *Id.* at 387.

[189] *Id.* at 388.

[190] *Id.* at 389.

[191] N.Y. County Lawyers' Assoc. v. State, 763 N.Y.S.2d 397 (N.Y. Sup. Ct.), *appeal withdrawn*, 2 A.2d 1489 (N.Y. Sup. Ct. 2003).

[192] *N.Y. County Lawyers' Assoc.*, 763 N.Y.S.2d at 399.

V. CONCLUSION

The implementation of a centralized administration of indigent representation would serve to protect the constitutional rights of indigent defendants, the rights of the attorneys representing those defendants, and to preserve the integrity of the judicial branch. In a state-funded system, delivery of defense services can be handled consistently using state-wide standards. For example, requiring the same minimum qualifications from defenders in every county in the state would eliminate disparities between counties as to the quality of defense services provided. Caseloads could be more evenly distributed, because ample funding for public defender offices would make part-time defenders a thing of the past. Funding for a full-time public defender office would also attract qualified attorneys who are dedicated to criminal defense work, rather than part-time defenders who give preference to paying clients. Special considerations could be given to funding for those counties with high crime rates and small budgets.

In *Wilson v. State*, the Mississippi Supreme Court accepted the Legislature's delay in creating an adequate system for indigent defense services, reasoning that the Legislature needed time to "conduct hearings to determine the extent of the need," and study the extent and causes of the State's problems.[198] The hearings have come and gone, and fourteen years have passed. Time and again, the State has been given the facts. It has been urged by Mississippi's highest court, the Mississippi Bar Association, and other organizations to take action with respect to the State's indigent defense crisis. The Legislature has failed, and the counties have been given the enormous responsibility of carrying the State's constitutional burden. The State has not paid for its neglect, but the poor have paid with their constitutional rights and with their freedom. If the courts do not have the authority to secure fundamental constitutional rights, then who does?

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[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 410.

[197] *Id.*

Erin V. Everett[*]

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[198] Wilson v. State, 574 So. 2d 1338, 1340 (Miss. 1990).

[*] I am extremely grateful to Jim Craig and Rob McDuff for their encouragement and assistance with this comment, as well as Andre DeGruy and William Voth for their informative contributions. Special thanks to my family, for always believing in me, in spite of the many reasons I have given them not to.

RECENT DECISION

CONSTITUTIONAL LAW—ELEVENTH AMENDMENT—ABROGATION OF STATES' SOVEREIGN IMMUNITY IN TITLE II OF THE AMERICANS WITH DISABILITIES ACT HELD A VALID EXERCISE OF CONGRESS'S FOURTEENTH AMENDMENT SECTION FIVE POWER

I. FACTS

Congress passed the Americans with Disabilities Act of 1990 (ADA) in order to remedy discrimination against disabled persons.[1] Respondents George Lane and Beverly Jones, both disabled, filed suit in federal court against the State of Tennessee for alleged violations of Title II of the ADA.[2] Lane alleged he was unable to answer a criminal charge in a second floor courtroom due to the absence of an elevator in the building, while Jones alleged she was unable to gain access to a number of courthouses in order to perform her job as a court reporter.[3] The State moved to dismiss the case.[4] The motion was denied without opinion, and the State appealed.[5] The Court of Appeals for the Sixth Circuit initially affirmed the district court's ruling, but then granted a petition for rehearing.[6] Consequently, the Sixth Circuit issued an amended opinion reaffirming the district court's ruling and remanding for further factual development.[7] The United States Supreme Court granted certiorari and held: affirmed.[8] The abrogation of the states' Eleventh Amendment immunity in Title II of the ADA is a legitimate exercise of Congress's enforcement power under Section Five of the Fourteenth Amendment with respect to the fundamental right of access to the courts.

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[1] Tennessee v. Lane, 124 S. Ct. 1978, 1984 (2004). Both the House of Representatives and the Senate passed the ADA by large majorities. *Lane*, 124 S. Ct. at 1984. It was enacted in response to the need for legislation addressing the widespread discrimination against individuals with disabilities. *Id. See* 42 U.S.C. § 12101(b)(1)-(4) (2000) (listing purposes for enacting ADA).

[2] *Lane*, 124 S. Ct. at 1982. Title II of the ADA prohibits discrimination in the area of public services, programs or activities. *Id.* at 1984. Both respondents are paraplegics who require the use of a wheelchair. *Id.* at 1982. They claimed they were denied access to the state court system because of their disabilities and sought damages and equitable relief under Title II of the ADA. *Id.* at 1982-83.

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[3] *Id.* at 1983. Lane refused to crawl up two flights of stairs to the courtroom, which he had done on a previous occasion, and refused to be carried to the courtroom. *Id.* at 1982-83. Jones alleged that the denial of access caused her to lose her job and participate in the justice system. *Id.* at 1983.

[4] *Id.* at 1983. The State argued that the plaintiff's suit was barred by the doctrine of state sovereign immunity derived from the Eleventh Amendment. *Id.*

[5] *Id.* On appeal, the United States intervened in defense of Title II's abrogation of state sovereign immunity. *Id.* The Sixth Circuit delayed its ruling pending the outcome of a United States Supreme Court case dealing with a related issue. *Id.*

[6] *Id.* Following its interpretation of a recent Supreme Court decision, the Sixth Circuit ruled that while ADA claims against States based on equal protection principles were barred by Eleventh Amendment immunity, claims founded on due process principles were not. *Id.* The Court therefore held the Eleventh Amendment did not preclude respondents' claims because they were based on rights assured by the Due Process Clause of the Fourteenth Amendment. *Id.* However, the Court granted a petition for rehearing after the State argued that respondents' complaint did not allege violations of due process. *Id.*

[7] *Lane*, 124 S. Ct. at 1983-84. The Sixth Circuit explained that the Due Process Clause of the Fourteenth Amendment protects the right of access to the courts. Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003). The court of appeals recognized that it was reasonable for Congress to enact legislation designed to protect disabled persons from denial of their constitutional rights, including the right of access to the courts. *Lane*, 315 F.3d at 682. However, the court of appeals did not completely reject the State's argument that the appellees' claims were barred by the doctrine of state sovereign immunity. *Id.* Rather, the court of appeals recognized a need for a factual record, affirmed the lower court's ruling and remanded for further proceedings. *Id.*

[8] *Lane*, 124 S. Ct. at 1994. Justice Stevens delivered the opinion of the Court, joined by Justices O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 1982. Justice Souter filed a concurring opinion joined by Justice Ginsburg. *Id.* Justice Ginsburg filed a concurring opinion with Justices Souter and Breyer joining. *Id.* Chief Justice Rehnquist filed a dissenting opinion, in which Justice Kennedy and

II. RELATED LAW

The Eleventh Amendment to the Constitution of the United States provides that "[t]he Judicial power of the Unites States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[9] Although a plain reading of the text implicates immunity in diversity actions only, the Supreme Court has held the states' immunity extends to suits against a state filed by a citizen of that state.[10] While the general thrust of the amendment aims to prevent suits by private citizens against non-consenting states,[11] modern Eleventh Amendment jurisprudence recognizes that Congress may abrogate a state's sovereign immunity without its consent.[12]

Justice Thomas joined. *Id.* Justice Thomas and Justice Scalia also filed dissenting opinions. *Lane*, 124 S. Ct. at 1978.

[9] U.S. CONST. amend. XI. The Eleventh Amendment was enacted and ratified in response to the Supreme Court's ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), where federal jurisdiction was upheld in a dispute between a citizen of South Carolina and the State of Georgia. *See generally* John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 256-57 (1994) (describing facts of *Chisholm*); Todd B. Tatelman, Nevada Department of Human Resources v. Hibbs: *The Eleventh Amendment in a States' Rights Era: Sword or Shield?*, 52 CATH. U. L. REV. 683, 685-86 (2003) (summarizing development of sovereign immunity doctrine).

[10] *See* Hans v. Louisiana, 134 U.S. 1 (1890). The Court recognized the doctrine of state sovereign immunity existed prior to the adoption of the Eleventh Amendment and was therefore not limited by its language. *Hans*, 134 U.S. at 15-16.

[11] *See id.* at 16. The Court noted the long time legal principle that a state cannot be sued without its consent. *Id.*

[12] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989) (plurality opinion) (interpreting Interstate Commerce Clause to grant Congress power to abrogate state sovereign immunity), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding Congress may abrogate state sovereign immunity pursuant to enforcement of Fourteenth Amend-

A. *Modern Scope of Congress's Abrogation Power Defined*

In *Seminole Tribe v. Florida*,[13] the Supreme Court considered whether Congress had the constitutional authority to abrogate the states' sovereign immunity under the Indian Commerce Clause.[14] The case involved a dispute over alleged violations of the Indian Gaming Regulatory Act (IGRA).[15] The Court ruled that Congress did not have the authority to subject the states to suit in federal court under its Indian Commerce Clause power.[16] The Court first reasoned that Congress had clearly expressed its intent to abrogate the states' sovereign immunity.[17] The Court then considered whether Congress acted under a legitimate grant of constitutional authority.[18] Overruling an earlier decision,[19] the Court limit-

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ment). *See generally* 32A AM. JUR. 2D *Federal Courts* § 1146 (1995 & Supp. 2004) (summarizing Congress's Eleventh Amendment abrogation power).

[13] 517 U.S. 44 (1996).

[14] *Seminole Tribe*, 517 U.S. at 55. The petitioner argued that Congress validly abrogated the states' sovereign immunity under the Indian Commerce Clause when it enacted the Indian Gaming Regulatory Act. *Id.* at 55.

[15] *Id.* at 51-52. IGRA, passed pursuant to Congress's Indian Commerce Clause power, imposed certain duties upon the states related to their dealings with Indian tribes. *Id.* at 47. Significantly, the legislation provided the tribes with the right to sue the states in federal court for violations of the Act. *Id.* The Seminole Tribe filed this action to compel gaming negotiations with the State of Florida alleging a violation of the Act's duty to negotiate in good faith. *Id.* at 51-52.

[16] *Id.* at 72-73. The Court found the Indian Commerce Clause was not a legitimate vehicle for bypassing the restrictions placed on the judiciary by the Eleventh Amendment. *Id.* The Court first examined whether Congress had expressed its intention to abrogate and then turned to whether Congress had acted in response to a valid grant of constitutional power. *Id.* at 55, 59. *See* Green v. Mansour, 474 U.S. 64, 68 (1985) (noting that validity of congressional abrogation of Eleventh Amendment immunity based on two predicate questions: whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity" and whether legislation was passed "pursuant to a valid exercise of power.").

[17] *Seminole Tribe*, 517 U.S. at 57. The Court found IGRA clearly expressed Congress's intent to abrogate. *Id.* at 56-57. *See also* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991) (reiterating that congressional abrogation of Eleventh Amendment immunity must be "exercised by a clear legislative statement"); Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (noting that congressional intent to abrogate states' Eleventh Amendment immunity must be unequivocal and textual).

[18] *Seminole Tribe*, 517 U.S. at 59. The Court recognized Congress could abrogate state sovereign immunity under two provisions of the Constitution: Section

ed Congress's ability to abrogate the states' sovereign immunity to its Section Five enforcement power of the Fourteenth Amendment.[20]

B. *The 'Congruence and Proportionality' Test*

In *City of Boerne v. Flores*,[21] the Supreme Court considered the constitutionality of Congress's enactment of the Religious Freedom Restoration Act (RFRA).[22] The dispute arose after a Catholic archbishop was denied a building permit to enlarge a church in Boerne, Texas.[23] The archbishop chal-

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Five of the Fourteenth Amendment and the Interstate Commerce Clause. *Id.* at 59. *See Union Gas*, 491 U.S. at 5 (plurality opinion) (interpreting Interstate Commerce Clause to grant Congress power to abrogate state sovereign immunity); *Fitzpatrick*, 427 U.S. at 456 (holding Congress may abrogate state sovereign immunity pursuant to enforcement of Fourteenth Amendment). In addition, the Court found no difference between the Interstate Commerce Clause and the Indian Commerce Clause as applied to Congress's power to abrogate the states' sovereign immunity. *Seminole Tribe*, 517 U.S. at 63.

[19] *Seminole Tribe*, 517 U.S. at 72. The Court overruled *Union Gas* and stated "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73.

[20] *Id.* Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. After *Seminole Tribe*, Congress's power to abrogate state sovereign immunity is restricted to Section Five of the Fourteenth Amendment. Evelyn Corwin McCafferty, *Age Discrimination and Sovereign Immunity: Does* Kimel *Signal the End of the Line for Alabama's State Employees?*, 52 ALA. L. REV. 1057, 1061 (2001). *See also* Ryan Gill, *State Immunity and the Americans with Disabilities Act After* Board of Trustees of the University of Alabama v. Garrett, 74 U. COLO. L. REV. 1239, 1245-46 (2003) (outlining Eleventh Amendment doctrine); Donald J. Spero, *State Immunity to Suits in Federal Court Under Federal Employment Laws After* Seminole Tribe v. Florida, 29 U. MEM. L. REV. 739, 740-42 (1999) (reviewing developments in Eleventh Amendment doctrine).

[21] 521 U.S. 507 (1997).

[22] *Boerne*, 521 U.S. at 511. RFRA was enacted in response to the Supreme Court's decision in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), where the Court ruled that generally applicable laws affecting religious practices did not have to be supported by a compelling government interest. *Boerne*, 521 U.S. at 512-14.

[23] *Boerne*, 521 U.S. at 512. The church planned to enlarge its building to accommodate its growing congregation. *Id.* However, its alteration plan required approval by the Historic Landmark Commission before a building permit could be issued. *Id.* The permit was denied and the archbishop brought suit in federal

lenged the authorities on multiple grounds, including RFRA.[24] The Supreme Court held that Congress overstepped its Section Five enforcement powers in enacting RFRA.[25] The Court noted the nature of Congress's Section Five power included the ability to enforce the amendment's provisions but not define what comprised a constitutional violation.[26] The Court further reasoned that legislation would fit within the scope of Congress's Section Five power if it exhibited "congruence and proportionality" to the remedy it sought to enforce.[27] Applying this standard, the Court found that RFRA was not congruent and proportional to the rights it sought to protect.[28] Importantly, the Court's reasoning in *Boerne* would

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court to challenge the city's decision. *Id.*

[24] *Id.* The archbishop argued that RFRA prohibited the city from denying the building permit. *Id.* However, the District Court ruled that RFRA was an invalid exercise of Congress's enforcement power. *Id.* The Fifth Circuit reversed the lower court's ruling on interlocutory appeal, and the Supreme Court granted certiorari. *Id.*

[25] *Id.* at 536. The Court determined that RFRA could not be considered remedial legislation because it was "so out of proportion to a supposed remedial or preventive object that it [could] not be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Consequently, the Act was ruled unconstitutional because it prevented all levels of government from enacting legislation that would substantially burden religious practices. *Id.*

[26] *Id.* at 519. The Court cited *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), when it acknowledged that Section Five was "a positive grant of legislative power." *Boerne*, 521 U.S. at 517. The Court also recognized particular instances where Congress had validly exercised power to enforce the Fourteenth and Fifteenth Amendments. *Id.* at 518. *See e.g.*, City of Rome v. United States, 446 U.S. 156, 162 (1980) (upholding provision of Voting Rights Act that requires pre-clearance of any change in voting practice or procedure); Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (upholding nationwide ban on literacy tests and other voting requirements for voter registration); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding provisions of Voting Rights Act of 1965). However, the Court noted Congress's Section Five power was "remedial." *Boerne*, 521 U.S. at 519. *See Katzenbach*, 383 U.S. at 326 (referring to Congress's Fourteenth Amendment enforcement power as "remedial"). The Court also reasoned that Section Five legislation cannot create substantive rights, but must be remedial in nature. *Boerne*, 521 U.S. at 520.

[27] *Boerne*, 521 U.S. at 520. The Court reasoned there is a fine line between actions that remedy a constitutional violation and actions which create substantive changes in the law. *Id.* at 519-20. Therefore, the Court determined "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

[28] *Id.* at 532. The Court compared RFRA to the Voting Rights Act at issue in

become the benchmark by which all congressional legislation invoking the Fourteenth Amendment's Section Five enforcement power would be measured.[29]

C. *Application of the 'Congruence and Proportionality' Test*

In *Kimel v. Florida Board of Regents*,[30] the Supreme Court considered whether Congress's abrogation of the states' sovereign immunity in the Age Discrimination in Employment Act (ADEA) was constitutional.[31] The dispute involved a consolidation of three cases where the plaintiffs, all state employees, brought suit against the State for alleged violations of the ADEA.[32] The Supreme Court applied the congruence and proportionality test and held the abrogation of state sovereign immunity in the ADEA exceeded Congress's Section Five enforcement power.[33] First, the Court recognized that the Act

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Katzenbach. *Id.* at 530. The Court noted that unlike the record before Congress when it enacted the Voting Rights Act, RFRA's congressional record failed to identify any evidence of laws passed for the purpose of burdening religion. *Id.* Furthermore, the remedy assigned by RFRA was disproportionate to the injury it claimed to vindicate. *Id.* at 532.

[29] *See generally* Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 488 (1998) (noting that after *Boerne*, parties asserting abrogation must show that (1) Congress unequivocally stated its intent to abrogate, (2) Congress acted pursuant to enforcement power of Fourteenth Amendment and (3) use of enforcement power was valid under circumstances); Winston Williams, *Check and Checkmate: Congress's Section 5 Power After* Hibbs, 71 TENN. L. REV. 315, 318-21 (2004) (describing *Boerne* as "The Foundation for Modern Fourteenth Amendment Jurisprudence").

[30] 528 U.S. 62 (2000).

[31] *Kimel*, 528 U.S. at 72. The ADEA prohibits employers from discriminating against employees on the basis of age. *Id.* at 66.

[32] *Id.* at 69-71. The state employers in each case argued that plaintiffs' claims were barred by the Eleventh Amendment. *Id.* at 66.

[33] *Id.* at 91. First, the Court acknowledged that Congress was required to clearly state its intent to abrogate the states' Eleventh Amendment immunity in the language of the statute. *Id.* at 73. *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). Upon examination of the language of the ADEA, the Court found that Congress had in fact clearly indicated its intent to abrogate. *Kimel*, 528 U.S. at 75-76. The Court then examined whether

held age discrimination to a higher standard than was required by the Constitution.[34] In addition, the Court reasoned that Congress's failure to identify a pattern of unconstitutional age discrimination in state employment revealed "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[35] The *Kimel* decision marked the

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Congress's actions were within the scope of its constitutional authority. *Id.* at 78. The Court noted that Congress lacks power to abrogate state sovereign immunity under Article I of the Constitution. *Id.* Furthermore, the Court recognized recent decisions where it reaffirmed the holding of *Seminole Tribe. Id.* at 78-79. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (recognizing congressional power under Article I does not include power to abrogate state sovereign immunity); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.*"); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (acknowledging that Patent Remedy Act could not be sustained under Commerce Clause or Patent Clause because Congress does not have authority to abrogate Eleventh Amendment immunity under Article I). The Court in *Kimel* then acknowledged that Congress may only abrogate Eleventh Amendment immunity under Section Five of the Fourteenth Amendment. *Kimel*, 528 U.S. at 80. However, when the Court applied the congruence and proportionality test, it found that "the ADEA was not appropriate legislation under § 5 of the Fourteenth Amendment." *Id.* at 82-83 (internal quotations omitted).

[34] *Kimel*, 528 U.S. at 83. The Court noted its previous decisions illustrating that age is not a suspect classification under the Equal Protection Clause. *Id. See* Gregory v. Ashcroft, 501 U.S. 452, 471 (1991) (recognizing age is not suspect class where state judges forced to retire at age seventy); Vance v. Bradley, 440 U.S. 93, 97 (1979) (applying rational basis review to government action based on age); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (declining to label age as suspect classification where police officer forced to retire at fifty). In addition, the court cited *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985), when it noted "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Kimel*, 528 U.S. at 83 (internal quotations omitted). Accordingly, the Court reasoned that since the ADEA held age discrimination to a higher standard, the Act's effect was to prevent far more state employment activities than would be held unconstitutional under the equal protection standard. *Id.* at 86.

[35] *Kimel*, 528 U.S. at 91. As the Court found in *Boerne*, the absence of a congressional record exhibiting evidence of age discrimination and the significant expansion of substantive requirements rendered the ADEA an unconstitutional exercise of Congress's Section Five power to enforce the Fourteenth Amendment. *Id.*

Court's first application of the congruence and proportionality standard to legislation purporting to abrogate Eleventh Amendment immunity as a remedy for state discrimination.[36]

D. *'Congruence and Proportionality' Meets the ADA*

In *Board of Trustees of the University of Alabama v. Garrett*,[37] the Supreme Court considered whether a state could be sued for money damages in federal court under Title I of the ADA.[38] The petitioners challenged the decision of the court of appeals holding that Congress validly abrogated the state's sovereign immunity when it enacted the ADA.[39] In the spirit of its previous decisions, the Court held the states could not be the subject of private suits under Title I of the ADA.[40] After acknowledging the applicable Eleventh Amendment doctrine,[41] the Court divided its inquiry into three parts.[42]

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[36] *E.g.*, Gill, *supra* note 20, at 1252 (asserting that *Kimel* was first opportunity for Supreme Court to apply congruence and proportionality test to federal legislation claiming to abrogate Eleventh Amendment Immunity as remedy for state discrimination).

[37] 531 U.S. 356 (2001).

[38] *Garrett*, 531 U.S. at 360. Title I of the ADA prohibits employment discrimination against disabled persons. *Id.* at 360-61. The Court noted that it was only disposed to decide whether Title I allowed private suits against the states, leaving the issue of whether Title II allowed private suits to be decided at a later time. *Id.* at 360 n.1.

[39] *Id.* at 363. The case decided by the court of appeals was a consolidation of two separate claims. *Id.* at 362-63. Both respondents were state employees who filed suits seeking money damages for alleged discrimination under the ADA. *Id.* at 362. *See* Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (1999).

[40] *Garrett*, 531 U.S. at 374. Reversing the judgment of the court of appeals, a five-member majority, led by Chief Justice Rehnquist, ruled that Congress exceeded its Fourteenth Amendment authority by abrogating the states' sovereign immunity in Title I of the ADA. *Id.*

[41] *Id.* at 363-65. The Court cited *Kimel*, noting that Congress may abrogate the states' Eleventh Amendment immunity from private lawsuits if it clearly expresses its intent to do so and acts pursuant to a valid grant of constitutional authority. *Id.* at 363. Conceding the first element was not in dispute, the Court questioned whether Congress acted within its authority by allowing private suits against the states under Title I of the ADA. *Id.* at 364. Consequently, the Court noted that legislation aiming to protect rights outside the bounds of Section One of the Fourteenth Amendment should display congruence and proportionality be-

First, the Court sought to determine the scope of the actual constitutional right at issue.[43] Next, the Court examined the congressional record and found limited evidence of state discrimination associated with the employment of disabled persons.[44] Finally, the Court determined that even if a pattern of state discrimination were established, it would lack congruence and proportionality to the rights and remedies of the ADA.[45]

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tween the injury and the remedy adopted to prevent it. *Id.* at 365.

[42] *Id.* at 365-74. *See* Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of* Garrett*: An "as Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 147-54 (2004) (summarizing *Garrett* decision and noting three-tiered analysis); *see also* Joan Shinavski, *The Eleventh Amendment Bars Private Individuals from Suing State Employers for Money Damages Under Title I of the Americans with Disabilities Act:* Board of Trustees of the University of Alabama v. Garrett, 40 DUQ. L. REV. 161, 161-67 (2001) (summarizing facts and analysis of *Garrett*).

[43] *Garrett*, 531 U.S. at 365. The Court determined the Fourteenth Amendment did not require the states to make special accommodations for the disabled as long as their actions directed at such individuals are rational. *Id.* at 367. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445-46 (1985) (holding mentally-retarded persons were non-suspect class subject to rational basis review). Therefore, any legislation providing disabled persons with special accommodations would need to stem from "positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 368.

[44] *Garrett*, 531 U.S. at 368. Adhering to precedent, the Court declined to admit evidence of unconstitutional discrimination by city and county governments. *Id.* at 368-69. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (noting that Eleventh Amendment immunity does not extend to subdivisions of state government). The Court reasoned that it would be useless to examine constitutional violations by such local governments because Eleventh Amendment immunity does not apply. *Garrett*, 531 U.S. at 369. The Court also limited its analysis by refusing to recognize evidence of state disability discrimination included in a congressional task force report. *Id.* at 370-71. *But see id.* at 377 (Breyer, J., dissenting) (giving more weight to findings of congressional task force).

[45] *Garrett*, 531 U.S. at 372. The Court noted the duty to provide reasonable accommodations exceeded what was constitutionally required. *Id.* Ultimately, the Court held that the remedies proposed were not congruent and proportional to the targeted violations. *Id.* at 374.

E. Prophylactic Legislation Passes the 'Congruence and Proportionality' Test

In *Nevada Department of Human Resources v. Hibbs*,[46] the Supreme Court considered whether private suits for money damages could be brought against the states under the Family and Medical Leave Act (FMLA).[47] Respondent, a state employee, was terminated after exhausting his twelve weeks of FMLA leave to care for his ailing wife.[48] The Supreme Court held that the abrogation of the states' sovereign immunity in the FMLA was a valid exercise of Congress's Section Five enforcement powers.[49] The Court recognized the constitutional right at issue as "the right to be free from gender-based discrimination in the workplace" and noted it was subject to a heightened level of scrutiny.[50] After examination of the congressional record, the Court determined the evidence was sufficient to justify such remedial legislation.[51] Significantly, the *Hibbs* Court was the first to uphold remedial antidiscriminatory legislation under the congruence and proportionality standard.[52]

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[46] 538 U.S. 721 (2003).

[47] *Hibbs*, 538 U.S. at 725. The FMLA entitles employees with "up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a serious health condition in an employee's spouse, child, or parent." *Id.* at 724 (internal quotations omitted). The specific issue in the case was a split between the court of appeals on whether a state could be sued in federal court for a violation of the Act. *Id.* at 725. *Compare* Hibbs v. Dep't of Human Res., 273 F.3d 844, 858 (9th Cir. 2001) (interpreting FMLA to allow private suits against States), *with* Kazmier v. Widmann, 225 F.3d 519, 526, 529 (5th Cir. 2000) (refusing to allow private suits under FMLA).

[48] *Hibbs*, 538 U.S. at 725. Respondent was an employee of the Department of Human Services Welfare Division. *Id.* He was granted twelve weeks of FMLA leave which he used sporadically. *Id.* Upon exhausting his leave, he did not return to work and was subsequently terminated. *Id.*

[49] *Id.* at 740. The Court determined that the FMLA was congruent and proportional to the injuries it aimed to remedy, and therefore was a constitutional abrogation of the states' sovereign immunity. *Id.*

[50] *Id.* at 728. After summarizing the applicable Eleventh Amendment doctrine, the Court applied the congruence and proportionality test. *Id.* In its first step, the Court noted that gender based classifications were subjected to a heightened level of scrutiny. *Id. See* United States v. Virginia, 518 U.S. 515, 533 (1996) (noting government classifications based on gender must serve important government objectives and be substantially related to achieving those objectives in order to withstand heightened scrutiny); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

III. TENNESSEE V. LANE

A. Opinion of the Court

In *Tennessee v. Lane*,[53] the Supreme Court held the abrogation of the states' sovereign immunity in Title II of the ADA, as it applies to the fundamental right of access to the courts, to be a valid exercise of Congress's Section Five power to enforce the Fourteenth Amendment.[54] The Court began its analysis by summarizing the relevant Eleventh Amendment doctrine and addressing "whether Congress acted pursuant to a valid grant of constitutional authority."[55] Citing *Boerne*, the Court acknowledged that legislation aiming to remedy unconstitutional discrimination must exhibit congruence and proportionality between the remedy proposed and the injury to be prevented.[56] Continuing its analysis, the Court recognized

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[51] *Hibbs*, 538 U.S. at 735. The court noted a 1990 Bureau of Labor Statistics survey that demonstrated gender based stereotypes had the effect of putting men at a disadvantage as applied to extended leave. *Id.* at 730. The Court recognized additional evidence showing the discriminatory effect of then current family leave policies. *Id.* at 732. Ultimately, the Court determined that the evidence of discriminatory behavior by the states justified the enactment of the FMLA. *Id.* at 735.

[52] *Id.* at 740. The Court reached the opposite conclusion of both *Garrett* and *Kimel*. *Hibbs*, 538 U.S. at 735. *See generally* Jana L. Tibben, *Family Leave Policies Trump States' Rights:* Nevada Department of Human Resources v. Hibbs *and Its Impact on Sovereign Immunity Jurisprudence*, 37 J. MARSHALL L. REV. 599, 613-16 (2004) (arguing public policy influenced Court's decision).

[53] 124 S. Ct. 1978 (2004).

[54] *Lane*, 124 S. Ct. at 1994. Justice Stevens delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg and Breyer joined. *Id.* at 1982. The Court concluded that Title II was reasonable prophylactic legislation that exhibited congruence and proportionality to the right it sought to protect. *Id.* at 1993-94.

[55] *Id.* at 1985. The Court quickly dismissed this question in its inquiry, noting that the ADA explicitly expressed its intent to abrogate the states' sovereign immunity. *Id.*

[56] *Id.* at 1986. The Court recognized the relevant case law shaping the con-

Title II protects the same rights as Title I, but also aims to enforce another group of constitutional guarantees, including the right of access to the courts.[57]

Accordingly, the Court evaluated whether the congressional record supported the enactment of Title II.[58] Upon examining the evidence of physical inaccessibility of the court system, the Court noted the amount of evidence far exceeded the record in *Hibbs*.[59] Therefore, the Court determined the evidence before Congress when it enacted Title II of the ADA was sufficient to support such remedial prophylactic legislation.[60]

Finally, the Court applied the congruence and proportionality test and found the steps taken by Congress in Title II of the ADA to curb discrimination against disabled persons were in fact "congruent and proportional to [the] object of enforcing the right of access to the courts."[61]

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gruence and proportionality test. *Id.* at 1986-87.

[57] *Id.* at 1988. The Court focused on the right of access to the courts rather than the large group of rights that Title II claimed to protect. *Id.* The Court reasoned that the right of access to the courts is guaranteed by the Due Process Clause and a violation of such right was a violation of an individual's due process rights. *Id.*

[58] *Id.* at 1989. The Court noted numerous instances where the administration of state programs resulted in the violation of disabled persons' fundamental rights. *Id.* In addition, the Court recognized that Congress found major deficiencies in existing laws aimed to prevent discrimination against disabled persons. *Id.* at 1990.

[59] *Lane*, 124 U.S. at 1992. The Court noted a congressional report showing seventy-six percent of public programs and services located in public buildings were not accessible by disabled persons. *Id.* at 1990. It also noted testimony of disabled persons concerning the inaccessibility of local courthouses. *Id.* at 1991. In addition, a congressional task force documented numerous instances where disabled persons were excluded from state programs, services, jury service, etc. *Id.* Consequently, the Court noted the amount of evidence exceeded that present in the *Hibbs* decision. *Id.* at 1992.

[60] *Id.* The Court stated the congressional finding "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.*

[61] *Id.* at 1993. In accordance with the analysis employed in *Garrett* and *Hibbs*, the Court examined whether the actions taken by Congress were congruent and proportional to the ends to be attained. *Id.* As in *Hibbs*, the Court found that "Congress was justified in concluding that this difficult and intractable proble[m] warranted added prophylactic measures in response." *Id.* (alteration in

B. *Justice Souter's Concurring Opinion*

Justice Souter concurred in the *Lane* decision but wrote separately to note that a deeper investigation would reveal that the Court itself had supported discrimination against the disabled in the past.[62] After listing numerous instances of such discriminatory holdings, Justice Souter concluded the Court's decision took "a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps."[63]

C. *Justice Ginsburg's Concurring Opinion*

Justice Ginsburg concurred in the *Lane* decision and noted her decision was also based on support of the very objective of the ADA, to abolish the impediments that prohibit disabled persons from contributing to our nation's society.[64] Justice Ginsburg noted that Congress understood in enacting the ADA that "We the People" included persons with disabilities.[65] In conclusion, Justice Ginsburg reasoned that the record of discrimination against the disabled completely justified the remedial legislation of the ADA.[66]

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original) (internal quotations omitted). More specifically, the Court noted that Congress's chosen remedy of providing reasonable accommodations mirrored settled due process principles such as providing individuals with the opportunity to be heard. *Id.* at 1994. In any event, the Court found the duty to accommodate was proportional to the injury it aimed to prevent. *Lane*, 124 S. Ct. at 1994.

[62] *Id.* at 1995 (Souter, J., concurring). Justice Souter noted that the Court had sustained numerous administrative actions ranging from the sterilization of the mentally disabled to preventing children with cerebral palsy from appearing in public. *Id.* (Souter, J., concurring).

[63] *Id.* (Souter, J., concurring). Justice Souter welcomed the Court's decision as a positive step toward remedying not only discrimination against the disabled, but the harm caused by endorsement of the invidious discrimination of the past. *Id.* (Souter, J., concurring).

[64] *Lane*, 124 S. Ct. at 1996 (Ginsburg, J., concurring). Justice Ginsburg noted that the ADA "is a measure expected to advance equal-citizenship stature for persons with disabilities." *Id.* (Ginsburg, J., concurring).

[65] *Id.* at 1996 (Ginsburg, J., concurring). Justice Ginsburg emphasized the wide reaching intent of the ADA and Congress's understanding in enacting it. *Id.* (Ginsburg, J., concurring).

[66] *Id.* (Ginsburg, J., concurring). Justice Ginsburg believed Congress's intent in

D. Justice Rehnquist's Dissenting Opinion

Chief Justice Rehnquist dissented because he believed the Court's decision could not be reconciled with its previous ruling in *Garrett*.[67] Embarking on the same line of analysis followed by the majority, Chief Justice Rehnquist found a different result: Title II does not validly abrogate the states' sovereign immunity.[68] Chief Justice Rehnquist began by recognizing that Title II differs from previous legislation considered because it aims to enforce a wide array of constitutional rights.[69]

The Chief Justice disagreed with the Court's interpretation of Congress's evidentiary findings of discrimination and asserted "the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons."[70] In addition, Chief Justice Rehnquist sought to discredit the three items of evidence relied on by the Court in its decision.[71] The Chief Justice further reasoned that the "existence

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enacting the ADA was enough to justify subjecting the states to suit. *Id.* (Ginsburg, J., concurring). Justice Ginsburg reasoned that Congress has the power to subject the states to lawsuits for infringing on the rights of persons with disabilities. *Id.* (Ginsburg, J., concurring).

[67] *Id.* at 1997 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist felt the Court should adhere to its ruling in *Garrett* and not depart from the "well-established principles it embodies." *Id.* (Rehnquist, C.J., dissenting).

[68] *Id.* at 1998 (Rehnquist, C.J., dissenting). The Chief Justice reasoned that the Court, in reaching its decision paid lip service to the congruence and proportionality test and applied it in a manner inconsistent with recent precedent. *Id.* (Rehnquist, C.J., dissenting).

[69] *Lane*, 124 S. Ct. at 1998 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that the statutes in *Garrett*, *Hibbs*, *Kimel* and *Boerne* all sought to enforce a single constitutional right. *Id.* (Rehnquist, C.J., dissenting). Therefore, the task of identifying the constitutional right at issue was much easier than in the present case. *Id.* (Rehnquist, C.J., dissenting).

[70] *Id.* at 2000 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist considered the second step of his analysis crucial to determining whether Title II was a valid attempt to remedy actual constitutional violations or a baseless effort of Congress to redefine its power under Section Five of the Fourteenth Amendment. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice claimed the Court found no support in the legislative record suggesting Congress enacted the ADA in response to violations of disabled persons' due process rights. *Id.* at 1999-2000 (Rehnquist, C.J., dissenting).

[71] *Id.* at 2001 (Rehnquist, C.J., dissenting). The majority relied on a Civil

of an architecturally 'inaccessible' courthouse" was not a constitutional violation.[72] In the application of the congruence and proportionality test, Chief Justice Rehnquist disagreed with the "as applied" approach used by the Court.[73] The Chief Justice feared that the use of an "as applied" analysis would result in Congress having no incentive to enact Section Five legislation that actually addressed specific Constitutional violations.[74] Consequently, Chief Justice Rehnquist failed to recognize Title II as a valid exercise of Congress's Section Five power.[75]

E. Justice Scalia's Dissenting Opinion

Justice Scalia dissented in the *Lane* decision to express his discontent with the evolution of the congruence and pro-

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Rights Commission Report, testimony to a House subcommittee regarding the access to courthouses and evidence found by a congressional task force in reaching its decision. *Id.* (Rehnquist, C.J., dissenting). However, the Chief Justice's examination of the evidence yielded no proof of constitutional violations by the states. *Id.* at 2001-02 (Rehnquist, C.J., dissenting).

[72] *Id.* at 2002 (Rehnquist, C.J., dissenting). Interestingly, the Chief Justice reasoned that a constitutional violation occurs when a person is actually denied the opportunity to be present at a judicial hearing, not when that person cannot make his or her way into the actual courtroom. *Id.* (Rehnquist, C.J., dissenting). Therefore, even though evidence of inaccessible courthouses existed, it did not implicate actual violations of due process rights. *Id.* (Rehnquist, C.J., dissenting).

[73] *Id.* at 2003-04. (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that Title II's goal was to protect a host of rights other than those guaranteed by the Due Process Clause, therefore, Title II should be evaluated in the same manner. *Id.* at 2004. (Rehnquist, C.J., dissenting). The Chief Justice believed the proper analysis under *Boerne* and its progeny would be to measure "the breadth of [the] statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy." *Id.* at 2005 (Rehnquist, C.J., dissenting).

[74] *Lane*, 124 S. Ct. at 2005. (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that the use of an "as applied" approach did not follow recent precedent or the proper function of the court system. *Id.* (Rehnquist, C.J., dissenting).

[75] *Id.* at 2006. (Rehnquist, C.J., dissenting). Chief Justice Rehnquist believed the Court failed to establish evidence of discrimination or constitutional violations against persons with disabilities. *Id.* (Rehnquist, C.J., dissenting). Therefore, the Chief Justice felt that Title II of the ADA did not meet the threshold of the congruence and proportionality test. *Id.* (Rehnquist, C.J., dissenting).

portionality test.[76] Justice Scalia reasoned that the congruence and proportionality test invites "judicial arbitrariness and policy-driven decision making."[77] While acknowledging the doctrine of *stare decisis* would prevent the Court from backing away from its standard, Justice Scalia reasoned that the congruence and proportionality test should only be applied to legislation purporting to remedy racial discrimination.[78] Justice Scalia felt it was time to stop the progression of such a malleable standard and adopt a test clearly supported by the language of Section Five of the Fourteenth Amendment.[79]

F. Justice Thomas' Dissenting Opinion

Justice Thomas wrote separately to express that although he joined Chief Justice Rehnquist's dissent, he disagreed with any reliance on *Hibbs* in the dissent's conclusions.[80]

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[76] *Id.* at 2007 (Scalia, J., dissenting). After summarizing the Court's recent development of the congruence and proportionality standard, Justice Scalia reasoned that since *Hibbs*, the Court was breaking away from what the test once upheld. *Id.* at 2007-08. (Scalia, J., dissenting).

[77] *Id.* at 2008-09. (Scalia, J., dissenting). Justice Scalia reasoned that such tests forced the Court to be a watchdog over Congress and the legislation it enacted. *Id.* at 2009. (Scalia, J., dissenting). In his view, the Court should not adhere to policy that constantly imposes conflict with another branch of government. *Id.* (Scalia, J., dissenting).

[78] *Id.* at 2010-13. (Scalia, J., dissenting). Justice Scalia reasoned that the Fourteenth Amendment was originally drafted to combat racial discrimination, and therefore, Section Five should be given a narrower scope when applied to legislation that targets other forms of discrimination. *Id.* at 2012. (Scalia, J., dissenting).

[79] *Lane*, 124 S. Ct. at 2009, 2013. (Scalia, J., dissenting). Justice Scalia believed that the application of the congruence and proportionality test had moved far beyond the principal objectives of the Fourteenth Amendment. *Id.* at 2013. (Scalia, J., dissenting).

[80] *Id.* at 2013 (Thomas, J., dissenting). Justice Thomas agreed with the conclusion reached in the Chief Justice's dissent. *Id.* (Thomas. J., dissenting). However, since he believed *Hibbs* was wrongly decided, Justice Thomas disagreed with any reliance on *Hibbs* in the Chief Justice's dissent. *Id.* (Thomas, J., dissenting).

IV. DISCUSSION

In *Tennessee v. Lane*, the United States Supreme Court continued to shape modern Eleventh Amendment jurisprudence by further interpreting Congress's power to abrogate the states' sovereign immunity under Section Five of the Fourteenth Amendment.[81] *Lane* is the latest in a line of recent cases employing the congruence and proportionality standard set out in *Boerne*.[82] For the second time, the Court upheld remedial legislation by finding the abrogation of the states' sovereign immunity in Title II of the ADA to be a valid exercise of Congress's Section Five power.[83]

Although *Lane* is not the first instance of remedial legislation passing the congruence and proportionality test, the case is nevertheless significant because the *Lane* Court altered its *Boerne* analysis in two respects.[84] First, the Court narrowly evaluated the scope of the constitutional right at issue, focusing on Title II's application to the right of access to the courts.[85] In addition, the Court gave more deference to the congressional record than earlier cases implicated.[86] In any event, the Court's holding suggests a possible shift in the

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[81] *See supra* notes 12, 20, 27, 61 and accompanying text. The Court's decision mirrored that of *Garrett* by finding Title II to be a valid exercise of Congress's Section Five power. *See supra* notes 40, 43, 44, 45 and accompanying text.

[82] *See supra* notes 27, 33, 45, 50, 61 and accompanying text. Before *Lane*, only one other statute had passed the congruence and proportionality test as a valid exercise of Congress's Section Five enforcement power. *See supra* notes 49, 52, 61 and accompanying text.

[83] *See supra* notes 49, 52, 61 and accompanying text. In *Lane*, the Court stated that the "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *See supra* note 60 and accompanying text.

[84] *See supra* notes 57, 58, 59 and accompanying text. The legislation at issue in *Lane* aimed to protect more than one constitutional right. *See supra* note 57 and accompanying text.

[85] *See supra* note 57 and accompanying text. The legislation at issue in previous cases dealt with violations of a single constitutional right. *See supra* notes 22, 31, 38, 47 and accompanying text.

[86] *See supra* notes 58, 59, 60 and accompanying text. Despite Chief Justice Rehnquist's dissent on the matter, the Court found that the evidence supported enacting Title II of the ADA. *See supra* notes 59, 60, 70, 71 and accompanying text.

Court's willingness to recognize congressional abrogation of sovereign immunity.[87] While impossible to predict how future cases will be interpreted, the Court's analysis and holding will surely play a vital role in future interpretation of Congress's Section Five power to abrogate the States' sovereign immunity.[88]

V. CONCLUSION

Tennessee v. Lane represents the Supreme Court's ongoing development of modern Eleventh Amendment doctrine. The Court upheld Congress's abrogation of the states' sovereign immunity in Title II of the ADA as applied to the fundamental right of access to the courts. The Court reasoned that the remedies proposed in the legislation were congruent and proportional to the discriminatory acts they sought to protect. By holding that the states can be subjected to suit in federal court for violations of Title II, the Supreme Court shows that Congress can enact remedial legislation that passes the congruence and proportionality test. While future cases will surely refine this standard, it is clear that Congress's Section Five power to abrogate the states' sovereign immunity is currently alive and well.

Edward J. Everitt

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[87] *See supra* notes 60, 61 and accompanying text. Previous cases interpreted Congress's Section Five enforcement power narrowly. *See supra* notes 26, 27, 33, 40, 45 and accompanying text.

[88] *See supra* notes 54, 57, 58, 59, 61 and accompanying text. Future courts can use *Lane's* method of narrowly focusing on the scope of the right at issue and giving the congressional record deference when considering the constitutionality of Section Five legislation. *See supra* notes 57, 58, 59, 60 and accompanying text.

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